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No. 95-789-CFX

Title: California Division of Labor Standards Enforcement,
et al., Petitioners
v.
Dillingham Construction, N.A., Inc., and Manuel J.
Arceo, dba Sound Systems Media

Docketed:
November 21, 1995

Court: United States Court of Appeals for
the Ninth Circuit

Entry Date

Proceedings and Orders

Sep 28 1995	Application (A95-303) to extend the time to file a petition for a writ of certiorari from October 17, 1995 to December 16, 1995, submitted to Justice O'Connor.
Sep 29 1995	Application (A95-303) granted by Justice O'Connor extending the time to file until November 16, 1995.
Nov 16 1995	Petition for writ of certiorari filed. (Response due January 19, 1996)
Dec 7 1995	Order extending time to file response to petition until January 19, 1996.
Jan 19 1996	Brief amici curiae of California Apprenticeship Coordinators Association, et al. filed.
Jan 19 1996	Brief amici curiae of Washington, et al. filed.
Jan 19 1996	Brief amici curiae of CA Assn. of Sheet Metal and Air Condition Contractors, et al filed.
Jan 19 1996	Brief amicus curiae of Building and Construction Trades Department, AFL-CIO filed.
Jan 25 1996	Waiver of right of respondent Dillingham Construction to respond filed.
Jan 31 1996	DISTRIBUTED. February 16, 1996
Feb 12 1996	Response requested. (Due March 14, 1996)
Mar 15 1996	Brief of respondents Dillingham Construction, et al. in opposition filed.
Mar 25 1996	Reply brief of petitioners filed.
Mar 27 1996	REDISTRIBUTED. April 12, 1996
Apr 15 1996	Petition GRANTED. SET FOR ARGUMENT November 5, 1996. *****
May 13 1996	Order extending time to file brief of petitioner on the merits until June 17, 1996.
Jun 14 1996	Brief amici curiae of California Apprenticeship Coordinators Association, et al. filed.
Jun 17 1996	Joint appendix filed.
Jun 17 1996	Brief of petitioners California Division of Labor Standards Enforcement, et al. filed.
Jun 17 1996	LODGING consisting of 5 documents submitted by counsel for AFL-CIO
Jun 17 1996	Brief amici curiae of American Association of Retired Persons, et al. filed.
Jun 17 1996	Brief amicus curiae of National Electrical Contractors Association, Inc. filed.
Jun 17 1996	Brief amici curiae of Associated General Contractors of America, et al. filed.
Jun 17 1996	Brief amici curiae of Council of State Governments, et al. filed.

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Entry	Date	Proceedings and Orders
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Jun 17 1996	Brief amici curiae of AFL-CIO, et al. filed.
Jun 17 1996	Brief amici curiae of CA Assn. of Sheet Metal & Air Condition Contractors, et al. filed.
Jun 17 1996	Brief amicus curiae of United States filed.
Jun 17 1996	Brief amici curiae of Washington, et al. filed.
Jul 15 1996	Order extending time to file brief of respondent on the merits until August 1, 1996.
Aug 1 1996	Brief of respondents Dillingham Construction, et al. filed.
Aug 1 1996	Brief amici curiae of Associated Builders and Contractors, Inc., et al. filed.
Aug 1 1996	Brief amicus curiae of Signatory Members of Coalition to Preserve ERISA Preemption filed.
Aug 1 1996	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Aug 8 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 27 1996	Record filed.
Sep 3 1996	Reply brief of petitioners California Division of Labor Standards Enforcement, et al. filed.
Sep 13 1996	CIRCULATED.
Sep 20 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 29 1996	Record filed.
Nov 5 1996	ARGUED.

No.

95-789 NOV 16 1992

In The OFFICE OF THE CLERK
Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS; COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.; MANUEL J.
ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN M. REA, Chief Counsel,
(Counsel of Record)
VANESSA L. HOLTON,
Asst. Chief Counsel,
FRED D. LONSDALE, Sr. Counsel,
JAMES D. FISHER, Counsel,
SARAH COHEN, Counsel,

State of California
Department of Industrial
Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 972-8900

*Counsel for State Petitioners
Department of Industrial
Relations Division of
Apprenticeship Standards*

H. THOMAS CADELL, JR.,
Chief Counsel,
RAMON YUEN-GARCIA,
Counsel,

State of California
Division of Labor
Standards Enforcement
45 Fremont Street,
Suite 3220
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 975-2060

*Counsel for State Petitioners
Division of Labor Standards
Enforcement and County of
Sonoma*

QUESTION PRESENTED

Whether Congress intended, in enacting the Employee Retirement Income Security Act, to preempt states' traditional regulation of wages, apprenticeship and state-funded public works construction when expressed in a state prevailing wage law that restricts contractors' payment of lower apprentice specific wages to apprentices duly registered in programs approved as meeting federal standards.

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Petitioners State of California, encompassing its Department of Industrial Relations, Division of Labor Standards Enforcement and Division of Apprenticeship Standards and the County of Sonoma respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above action on June 7, 1995.

◆

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 57 F.3d 712 (9th Cir. 1995) and is reprinted in the appendix to this certiorari petition ("App.") at App. 1-22. The Order of the Court of Appeals denying California's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at App. 53-54. The opinion of the United States District Court for the Northern District of California granting California's Motion for Summary Judgment is reported at 778 F. Supp. 1522 (N.D. Cal. 1995) and is reprinted at App. 23-52.

◆

JURISDICTION

The Ninth Circuit issued its decision and judgment herein on June 7, 1995. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 19, 1995. An Application for Extension of Time to File Petition for Writ of Certiorari was filed September 28, 1995 and Justice Sandra Day O'Connor extended the time to file to and including November 16, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes are reproduced in the appendix at App. 55-63. The relevant federal statutory provisions are §§ 514(a) and (d), 29 U.S.C. §§ 1144(a) and 1144(d) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., and the National Apprenticeship ("Fitzgerald") Act 29 U.S.C. § 50. The relevant California statutory provision is California Labor Code § 1777.5.

STATEMENT OF THE CASE

California has a prevailing wage law which sets the minimum wages on a trade by trade basis that must be paid to workers on public works projects in the state. This law is modeled after and was passed in the same year as the Davis-Bacon Act, 29 U.S.C. § 276a, which sets the minimum wages that must be paid on federal public works projects. *O.G. Sansone Co. v. Dept. of Transportation*, 55 Cal. App. 3d 434, 448, 127 Cal. Rptr. 799 (1976). Like the Davis-Bacon Act, the California law allows a lower minimum wage for registered apprentices in apprenticeship programs approved as meeting the standards of the federal Fitzgerald Act. Under California law, as under the Davis-Bacon Act, the specific prevailing wage for apprentices is set at less than that for fully trained workers in the trade and varies with the apprentices' level of progress through the multi-year apprenticeship program. Cal. Lab. Code § 1777.5.

The County of Sonoma requested bids for the construction of its County Male Adult Detention Facility, a

public works project for which state, but not federal, prevailing wages were required under the California Labor Code. In early 1987 Dillingham was awarded the construction project and became the general contractor for the detention facility. Dillingham eventually subcontracted the audio security wiring work to Sound Systems Media.

After it began work on the detention facility in January, 1988, Sound Systems' employees changed their collective bargaining representative and Sound Systems entered a new employer group. Sound Systems entered into a collective bargaining agreement with the new union in which it agreed to use apprentices to be provided by the nascent Joint Apprenticeship and Training Committee (hereinafter "the Committee") established by that union and employer group. That Committee, however, had no working apprenticeship training program.

The Committee sought approval of its proposed standards to set up a new program from the California Apprenticeship Council, the agency recognized by the federal Bureau of Apprenticeship and Training as the body with authority to approve apprenticeship programs in California for federal purposes, including the Davis-Bacon Act. 29 C.F.R. § 29.12. The program's approval was pending when Sound Systems began working on this project for the County of Sonoma.

Notwithstanding the fact the Committee's standards had not been approved, beginning in June, 1988, Sound Systems began paying certain employees, whom it would later call "apprentices," what it designated an apprentice wage rate. This was contrary to the California law which

restricted the apprentice wage rate on public works to registered apprentices in approved training programs.

It is undisputed that Sound Systems employed no registered apprentices and in fact it had no apprentice agreements for these employees in its possession during the job. Payroll records filed with the California Division of Labor Standards Enforcement, and sworn to by Sound Systems, listed no employees designated as "apprentices." App. 5-6, 28 n.3. Moreover, Sound Systems volunteered at the trial level that these individuals designated as "apprentices" received no training.

This "apprentice" wage paid by appellant was lower than the journey level specified in the prevailing wage determination issued by the Department for this public work. As a result, the Department issued a "Notice to Withhold" directing Sonoma County to withhold monies from Dillingham based on Sound Systems' failure to pay the prevailing wage in accord with California Labor Code § 1771 because an alleged apprentice rate was paid to non apprentices. The contractors filed this action May 1, 1990 in the district court seeking declaratory relief and the recovery of monies withheld.

Cross motions for summary judgment were filed before the district court. The district court rejected appellants' Employee Retirement Income Security Act (ERISA) and National Labor Relations Act, 29 U.S.C. § 151 (NLRA) preemption arguments,¹ dismissed their motion for summary judgment and granted defendants' motion, App.

¹ The district court ruled that since state enforcement of minimum apprenticeship standards constitute a valid "minimum employment standard" they are not preempted by the

39-40, 48. The district court held that, because California's regulation of apprenticeship programs is part of a cooperative state-federal effort for the formulation and promotion of apprenticeship programs, it is saved from preemption by the federal Fitzgerald Act, 29 U.S.C. § 50, as incorporated in ERISA's Savings Clause, 29 U.S.C. § 1144(d).

On June 7, 1995, the Ninth Circuit reversed the district court, holding that the restriction of the apprentice prevailing wage to workers who were registered apprentices was preempted by ERISA. The Ninth Circuit based its holding on the following grounds: 1) California's application of its prevailing wage law to allow payment of the lower apprentice rate only to employees in "approved" programs had the effect and possibly the aim of encouraging participation in state approved ERISA plans while discouraging participation in unapproved ERISA plans. 2) California law was not saved from preemption by the ERISA Savings Clause because, while the Fitzgerald Act does provide for state approval of apprenticeship programs, it does not depend on state law for enforcement, does not mandate apprenticeship programs and does not seek to discourage other types of training programs. In the view of the Ninth Circuit the Fitzgerald Act would not be impaired by the preemption of this California law.

On June 21, 1995 California filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc asking

NLRA under *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) and *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987). The Ninth Circuit did not reach this issue.

the court of appeals to consider the conflict between its decision and the decision of the Eighth Circuit in *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995). The petition also asked the court to consider the conflict between its decision and the California Supreme Court's decision in *Southern California ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992), which upheld the state approval process from an ERISA preemption challenge insofar as that process did not impose standards not found in the federal Fitzgerald Act and which was based in part on the district court decision just reversed. Finally, the court was asked to consider the effect of this Court's then very recent decision *New York State Conference of Blue Cross and Blue Shield Plans, et al. v. Travelers*, ___ U.S. ___, 115 S. Ct. 1671 (1995) which had not been briefed. The court denied the Petition for Rehearing and Suggestion for Rehearing En Banc on July 19, 1995.

REASONS FOR GRANTING THE WRIT

For over 39 years before ERISA, California had adopted as a precondition for a lower apprentice wage on public works the same requirements – state approval of the apprenticeship program and state registration of apprentices – used by the federal government as the precondition for lower apprentice wages on federal public works. Like the federal government, California recognized that unless an apprenticeship program is actually providing effective training to beginning workers, there is no justification for paying those workers less than the legally required minimum prevailing wage. Reduced to

its essence, the Ninth Circuit held that a state may not, under ERISA, craft its use of its state prevailing wage law so that it will be consistent with the federal goal of encouraging apprenticeship program standards which meet federal standards. *Dillingham* results in workers being paid a wage rate, which is set lower than the prevailing journey rate, as if they were also receiving training meeting federal standards, on a *state-funded* public work without any obligation that these workers receive any training. The same wage payment at the apprentice rate by the same contractor on a *federally funded* public work to workers not registered in an apprentice plan approved by the state as meeting federal standards would bring civil, and possible criminal, sanctions.

This petition seeks certiorari on the question of whether ERISA preempts California's long standing policy of restricting the prevailing apprentice wage rate on state public works to registered apprentices, just as the comparable federal Davis-Bacon prevailing wage rules do for the same apprentices in the same trades in the same labor market on federal public works. *Dillingham's* conclusion that ERISA requires this change in long standing rules governing prevailing wages on public works is in error. First, ERISA's Savings Clause protects this state law from preemption as in furtherance of the Fitzgerald Act's articulated purpose. Second, ERISA's Preemption Clause does not reach state regulation of apprentices' wages because such wage laws concern wages paid by contractors to apprentices and do not directly "relate to" apprenticeship plans, only some of which are covered by ERISA.

I. Conflict Exists Within The Circuits On The Breadth Of The Savings Clause Of ERISA.

There is a direct conflict between the decision of the Ninth Circuit in this case and the Eighth Circuit decision in *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995). That conflict concerns an important question of national significance as to whether the Savings Clause of ERISA, 29 U.S.C. § 1144(d), protects from preemption a prevailing wage law that provides tailored wage rates only for registered apprentices in apprenticeship programs approved as meeting the standards of the Fitzgerald Act. Unless this Court resolves this conflict, contractors, apprentices and state and local public agencies in different states with similar state statutes² will face

² Thirty-two states have prevailing wage laws.

Twenty-eight states with prevailing wage laws restrict their sub-journey apprentice-specific wage to apprentices in programs registered with or approved by the state or BAT. The rule for four states is unclear.

Of those twenty-eight states, twenty-two states make this distinction by statute, rule or regulation. Arkansas Dep't of Labor Prevailing Wage Regulations § 3.103 (Rev. 1994); CAL. LAB. CODE § 1777.5 (West 1995); CONN. AGENCIES REGS. § 31-60-8 (1995); Delaware Prevailing Wage Regulations, § III(D)(1), (2) (Amended Sept. 15, 1995); HAW. ADMIN. RULES tit. 12, § 22-6 (Effective July 27, 1981); KY. REV. STAT. ANN. § 337.520(5) (Baldwin 1982); 803 KY. ADMIN. REG. 1:020 (Effective Oct. 2, 1974); MD. STATE FIN. & PROC. CODE ANN. § 17-201(b), 205(b), 208(e) (1988); MINN. R. 5200.1070 (1995); MO. CODE REGS. tit. 8, § 30.030; NEV. REV. STAT. § 338.080(2) (1985); N.J. ADMIN. CODE tit. 12, § 60-7.1, 7.3(c) (1995); New Mexico Rules & Regs. Under the Public Works Minimum Wage Act pt. VI, 6.2, 6.4 (Dep't Lab. Sept. 1989); N.Y. LAB. LAW § 231(7)(a) (McKinney 1986); OHIO REV. CODE ANN. § 4115.05 (Baldwin 1985); OHIO ADMIN. CODE § 4101:9-4-16 (1995); OKLA. STAT. tit. 40, § 196.1, 196.2(9), 196.6(A)

uncertainty and conflicting directives concerning the use of apprentices on public works projects.

The states of California and Minnesota have regulated apprenticeship since 1852 and 1939, respectively. Under the current Secretary of Labor regulations promulgated in 1977 and through the present, both states have been approved by the Bureau of Apprenticeship and Training of the Department of Labor ("BAT") as State Apprenticeship Council ("SAC") states.³ State

(1991); OR. ADMIN. R. 839-16-060 (Effective Nov. 10, 1994); 34 PA. CODE §§ 9.103(9), 83.5 (1975 and 1979); Rhode Island Rules & Regs. Relating to Prevailing Wages § 5 (1995); TENN. CODE ANN. § 12-4-401, et seq. (1975); TENN. COMP. R. & REGS. § 0800-3-2-.01 (Effective April 26, 1987); WASH. REV. CODE § 39.12.021 (1991); WIS. ADMIN. CODE & IND. 92.02 (Oct. 1990); WYO. STAT. § 27-4-403(c) (1977 and Supp. 1995). The remaining six states make this distinction by what ERISA's preemption clause would characterize as "other state action having the effect of law." See, e.g., Alaska Wage & Hour Admin. Pamphlet No. 600: Laborers' & Mechanics' Minimum Rates of Pay (Dep't Labor effective Dec. 1, 1995); Commonwealth of Massachusetts, Executive Office of Labor, Division of Apprentice Training, Minimum Wage Rates for Apprentices Employed on Public Works Projects (Rev. Nov. 9, 1995); Michigan Wage & Hour Division Policy Concerning Disputes Regarding Classifications: Act 166, C. 4.08 (Rev. July 1994); Montana Dep't of Labor & Industry Prevailing Wage Requirements, § A (effective July 1, 1994).

³ The following twenty-seven states are SAC states:

Arizona, California, Connecticut, Delaware, Florida, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and Wisconsin. The District of Columbia, Puerto Rico and the Virgin Islands are also SACs. U.S. Dep't of Lab., Employ. & Training Admin.: Bureau of Apprenticeship & Training, Directory (Jan. 1995).

Apprenticeship Council states are, under BAT regulations, authorized to approve apprenticeship programs for "federal purposes," to register apprentices, and to work to encourage inclusion of federal minimum standards in programs under the Fitzgerald Act, 29 U.S.C. § 50, and its regulations, 29 C.F.R. § 29.1 et seq. "Federal purposes" include determining whether a worker may be paid at an apprentice rate on federal public works. 29 C.F.R. § 5.5(a)(4). Those regulations restrict approval of training programs to those that are extensive, sophisticated and formal enough to be "apprenticeship."

The prevailing wage laws of California and Minnesota provide that all contractors on public works pay their workers the prescribed minimum wage deemed prevailing at the journey (fully trained) level in the location and for the trade or craft in which the work is performed. These laws parallel the federal Davis-Bacon law, which similarly sets the craft specific minimum wages paid on federal public works projects. One of the purposes of such prevailing wage laws is to assure that on public works projects that are awarded to the lowest bidder the contractors will not compete by reducing the wages and quality of labor on the project. *Universities Research Ass'n, Inc. v. Contu*, 450 U.S. 754 (1981); *Lusardi Const. Co. v. Aubry*, 1 Cal. 4th 976, 4 Cal. Rptr. 2d 837 (1992).

The prevailing wage laws of both California and Minnesota provide as well that workers who are registered as apprentices and are receiving training in apprenticeship programs registered with the respective state in accord with federal law may be paid a specially tailored apprentice wage. This apprentice specific rate parallels

the exception to the federal Davis-Bacon Act's requirement of journey level wages likewise limited to apprentices registered in state⁴ approved apprenticeship programs. The apprentice specific rate lowers the prevailing wage to a percentage of the journey level rate which is appropriate to the apprentice's training level. The apprentice rate is denied for workers receiving training, even informal apprenticeship, when the training program will not commit to the state to deliver the training at the level set by the federal standards, or to the apprentice by registering him or her as such in a program. Both commitments were lacking in *Dillingham*.

In *Minnesota ABC*, the Eighth Circuit held that the apprentice specific rate in the Minnesota prevailing wage law, allowing contractors to pay apprentices in approved programs at less than the prevailing wage, was "saved" from preemption under ERISA, 29 U.S.C. § 1144(d), because preemption of that law would impair the Fitzgerald Act. The Fitzgerald Act provides that:

[t]he Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the

⁴ In California, and the other SAC states listed in footnote 3. Where states do not participate under the Fitzgerald Act, the federal BAT does the approvals, under the same substantive standards. 29 C.F.R. § 29.12, App. 84.

formulation and promotion of standards of apprenticeship. . . .

Section 514(d) of ERISA, 29 U.S.C. § 1144(d) provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any of the laws of the United States . . . or any rule or regulation issued under such law."

The Eighth Circuit reasoned that preemption of Minnesota's regulation, MINN. R. 5200.1070 (1993 and Supp. I 1994) would "impair" the cooperative state jurisdiction over apprenticeship programs envisioned by the Act. One purpose of the Act is to promote and encourage apprenticeship, and labor standards in apprenticeship, in cooperation with the states. Consistent with this purpose, the federal Bureau of Apprenticeship and Training has promulgated federal apprenticeship regulations under the Act to provide national standards for apprentice agreements and program approval. As the Eighth Circuit recognized in *Minnesota ABC*, the purpose of the Act and regulations would be impaired if a state were not permitted to set an appropriate wage to be paid by contractors employing apprentices on state funded public works.

Such an apprentice specific wage rate may in fact be essential for contractors to be able to use apprentices economically on public works because apprentices lack the training to be as productive as journey level workers whose wage they would otherwise receive. The failure to recognize the costs to contractors who voluntarily assume training responsibilities at the higher, and more costly, level of apprenticeship meeting the federal standards

will, in the public construction sector, where lowest bidder rules universally apply, result in contractors avoiding the commitment to multi-year apprenticeship meeting the federal standard, fearing that any added costs will cost them work because they will be at a disadvantage in bidding on public works.

The Ninth Circuit in *Dillingham*, unlike the Eighth Circuit, took an extraordinarily narrow view of both the Fitzgerald Act and the Savings Clause of ERISA, holding that the preemption of California Labor Code § 1777.5's restriction of an apprentice specific wage to registered apprentices on state-sponsored public works, as applied, would not impair the operation of the Fitzgerald Act. The Ninth Circuit reasoned that because the Act, unlike Title VII, does not preserve non-conflicting state laws and "does not contemplate enforcement mechanisms," preemption of California Labor Code § 1777.5 does not impair this federal law. App. at 17. In so holding, the Ninth Circuit adopted and quoted from the Tenth Circuit opinion in *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir. 1992), which stated that "[The Fitzgerald Act] merely seeks to facilitate development of apprenticeship programs - it does not mandate apprenticeship programs or seek to discourage other training programs." *Id.* at 1562.

The Ninth Circuit erred by construing the Savings Clause of ERISA too narrowly. The Ninth Circuit said, in essence, that because the Fitzgerald Act does not mandate contractors to participate in apprenticeship, and does not order states to foster apprenticeship it is not the kind of "law of the United States . . . or any rule or regulation" to be saved. This holding is premised on a

top down view of federalism which presumes that cooperative partnerships between the states and the federal government are not worth saving. The Ninth Circuit restricts the state laws which can be saved to those which either are themselves coerced by the federal government, or which offer to deputize the state in a joint venture to coerce the private sector. Such a restrictive interpretation of the Savings Clause puts at risk the general run of laws in broad areas of benefits and health touched by ERISA, where cooperative federalism is increasingly the federal goal and where congressional reforms and block grants should allow the private sector and the state to voluntarily enter into partnerships.⁵

There is nothing in the ERISA Savings Clause that suggests that only certain kinds of federal statutory schemes are to be saved. Section 1144(d) says that ERISA "shall not be construed to alter, amend, modify, invalidate, impair, or supersede *any* laws of the United States . . ." (emphasis added). Although the leading case protecting a state law under this section dealt with a law that was coercive, *Shaw v. Delta Air Lines*, 463 U.S. 63, 100-106 (1983), in neither that opinion nor in the text of

⁵ Examples of laws implicated include the Job Training Partnership Act, 29 U.S.C. §§ 1501 et seq., the Carl Perkins Vocational and Applied Technology Education Act, 20 U.S.C. §§ 2301 et seq., and School to Work Opportunities Program, 20 U.S.C. §§ 6101 et seq. which assist the states, working in partnership with private industry and others, to create "state plans" to provide financial and technical support to encourage the vocational education and training of students and workers. State participation is voluntary, like the Fitzgerald Act, and the states are free to create their own criteria to determine which programs to support. 20 U.S.C. § 2323, 20 U.S.C. § 6143(d).

ERISA is there a proviso restricting this clause to coercive laws. The federal government cannot effectively encourage states to promote apprenticeship standards, meeting federal basic standards, if ERISA is read as preempting states when they voluntarily adopt those standards as their definition of "apprentice" on state public works.

Aside from misreading ERISA's federal law Savings Clause, the Ninth Circuit narrowly and selectively read the congressional intent set out expressly in the text of the Fitzgerald Act. While the Ninth Circuit recognized that Congress noted and approved of a cooperative state-federal venture in the Fitzgerald Act, it missed an expression of intent equally worth saving: The promotion and the furtherance of labor standards necessary to safeguard the welfare of apprentices and the extension of "the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship." The Ninth Circuit's narrow reading of the congressional mandate does not square with the fact that "contracts of apprenticeship" are, by the Secretary of Labor's own definition,⁶ multi-year educational endeavors, encompassing the apprentices' work on private, state-funded and federally funded work in a trade or craft, and not a transient arrangement entered into for one federal public works job, and then discarded. It is paradoxical that the only role *Dillingham* saves for the state under the Act is to extend labor standards on federal projects by reviewing and approving programs for BAT, and registering those programs' apprentices for BAT, so that federal public

⁶ 29 C.F.R. §§ 29.2(e), 29.5, App. 65, 72-75.

works can preserve apprentices' labor standards on federal jobs, in precisely the ways that the state may not on its own. Indeed, many states may no longer choose to volunteer for such a job, and instead may wash their hands of any so limited a role in promoting apprenticeship.

The Ninth Circuit's holding sets in motion a labor market distortion ruinous to the congressional goals of the Fitzgerald Act. The Ninth Circuit's rule creates an economic disincentive for contractors to enter into apprenticeship agreements that meet the federal standards for training. If any worker can be paid the lower apprentice wage on public works just because the worker is ensconced in a generic unapproved program which is less costly because it has no objective training standards, is thrown together for a single contract, lacks outside schooling or safety training, and allows an unlimited number of apprentices to work regardless of whether journey level workers are present to provide on-the-job training – but is covered by ERISA⁷ – then contractors have an economic incentive to move to such cheaper

⁷ Although, in order to be covered by ERISA, a plan need not even be a formal written plan, *Donovan v. Diillingham*, 688 F.2d 1367 (11th Cir. 1988), a one-page trust form would allow a contractor to draft a minimally adequate plan to bring the temporary "apprenticeship" arrangement under ERISA. The plan need not comply with all of ERISA's requirements. *Id.* Benefit levels for welfare benefits can be changed at any time. *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992). Welfare benefit plans permit employers to be their own plan trustees, and no minimum funding is required by ERISA, unlike pension plans.

programs and away from federally approved apprenticeship. By restricting the apprentice wage to apprentices in programs approved as meeting the federal standards for apprenticeship, the federal goal of minimum apprenticeship standards is protected.

States will also pull back from apprenticeship because they will be concerned that the lack of any objective standards for who can be paid an apprentice wage rate will undercut the prevailing wage law completely. *Cf. Building and Const. Trades v. Donovan*, 712 F.2d 611, 625 (D.C. Cir. 1983) (prevailing wage laws can be subverted by arbitrary classifications). Restricting the reduced apprenticeship wage to registered apprentices in approved plans is needed to protect the regulation of the journey-level prevailing wage for the same reasons that the Davis-Bacon regulations restrict the availability of apprentice wages on federal public works to registered apprentices in plans approved by the state. The real (non ERISA related) problem is that if the state allows anyone to be called an "apprentice" at the contractor's option, then there is no longer a prevailing wage which can be enforced at the journey level. Ethical contractors will lose bids to those willing to style all workers "apprentices" and pay the lowest wage, getting around the prevailing wage law. The most logical way out of the dilemma is to restrict the apprentice-specific wage to those to whom the nation-wide definition, in the Secretary of Labor's regulations, applies – apprentices registered in programs which meet the federal standards, and have the approval to show it. Contractors must be able to bid on public works without concern that a competitor will have an unfair advantage in the bid process by using phony apprentices.

The Ninth Circuit also creates another disincentive for states to promote apprenticeship. Although apprentices registered in state approved programs are, by definition, less skilled than the journey level workers, they are at least overseen by journey level workers on the state job and participate in ongoing classroom instruction, 29 C.F.R. § 29.5(b)(9). This is not true for "apprentices" in ad hoc informal programs. If the apprentice wage is not restricted to registered apprentices in programs with some minimum guarantee of standards, the states have lost an important guarantee of adequate quality of craft⁸ work on public works projects. For the state to encourage apprenticeship and allow less skilled workers on public works projects, the state must be convinced that the apprentices are workers whom the contractor has a self-interest in teaching to work up to high standards because the contractor must live with the consequences of his teaching beyond this one job which happens to be public works.

A rule like the Ninth Circuit's which commands states to allow apprentice wages to those not registered in programs that are approved as meeting federal standards, while state approval continues to be required on federal Davis-Bacon construction in the same state, runs against Congress's intent in ERISA of protecting employers from "conflicting and inconsistent state and local regulation"

⁸ Construction work that is unskilled is done by laborers. Workers who do the skilled craft work must be paid the journey level rate for that craft, except for apprentices. It is the opportunity to have the craft work done by the unskilled at the modest apprentice rate which will threaten the quality of the work done.

of such plans, to the degree that the apprenticeship programs are covered by ERISA. *Travelers* at 1677-1678. Since federal Davis-Bacon rules restrict the wage break to registered apprentices in approved programs, a different rule for state projects would create the absurd situation that ERISA, in the name of simplicity and uniformity, creates one set of rules for a contractor working on a federal courthouse or jail and another set of rules when that same contractor goes across the street to wire the sound security system in the county jail, as here.

The Ninth Circuit has taken an unnecessarily narrow view of the ERISA Savings Clause which, as discussed above, leads to results which are counter to the intent of Congress in passing ERISA and the Fitzgerald Act. The Eighth Circuit's *Minnesota ABC* contrary view creates no such anomalies. This Court should grant certiorari in order to resolve this direct conflict between the Circuits and, as will be discussed below, effectuate the intent of Congress which this Court has recently emphasized is the touchstone for understanding the limits of ERISA preemption.

II. The Ninth Circuit's Conclusion That Congress Invalidated California's Longstanding System Of Setting Prevailing Wages For Apprentices On Public Projects When It Enacted ERISA Is Based On The "Unhelpful" Approach To ERISA Preemption Specifically Disapproved In *New York State Conference of Blue Cross and Blue Shield et al. v. Travelers*, 115 S. Ct. 1671 (1995).

The Ninth Circuit in this case erred not only in its application of ERISA's Savings Clause but also in

disregarding entirely an opinion, *New York State Conference of Blue Cross and Blue Shield et al. v. Travelers*, 115 S. Ct. 1671 (1995), decided two months before Dillingham in which this Court "recognize[d] that our prior attempt to construe the phrase 'relate to' does not give . . . much help," 115 S. Ct. at 1677, and announced a new orientation in determining the reach of ERISA preemption.⁹

Specifically, the Ninth Circuit's decision concluded that § 514(a) of ERISA, declaring preempted "all state laws insofar as they . . . relate to any employee benefit plan," is applicable here even though the statute preempted is a law of general application which applies without regard to whether the apprenticeship program in question is an ERISA-covered plan or not; even though the statute applies to contractors, not plans; even though assuring effective apprenticeship training of young people has long been understood to be a traditional concern of state governments; and even though the statute, which governs only contracting by state entities, does not affect any employer who does not choose to do business with the state or its subdivisions. App. 15. In ruling that the law "relates to" ERISA plans the Ninth Circuit made no attempt to inquire into whether its ruling serves the overall purposes of ERISA and of ERISA preemption, nor did the court below inquire into whether there was any indication that Congress in 1974 had intended to displace

⁹ Petitioners specifically brought *Travelers* to the Ninth Circuit's attention in their Petition for Rehearing and Suggestion for Rehearing In Banc.

states from their traditional role of assuring both adequate training and fair labor standards for apprentices working on state-funded projects.

Just last term, however, in *Travelers* this Court rejected such "uncritical literalism" in applying § 514(a) of ERISA. 115 S. Ct. at 1677. First, *Travelers* noted that "[i]f 'relate to' were taken to the furthest reaches of indeterminacy, then for all practical purposes pre-emption would never run its course." *Id.* At the same time, *Travelers* recognized that it is apparent both from statutory terms of limitation and "the presumption against pre-emption," *id.*, that ERISA does not displace states' authority to legislate *whenever* there is some impact on an employee benefit plan. Because of "the unhelpful text [of § 514(a)] and the frustrating difficulty of defining its key term," *id.*, *Travelers* superseded this Court's "prior attempt to construe the phrase 'relate to' " with a new mode of analysis based on "looking . . . to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.*

Because the Ninth Circuit's text-centered approach to ERISA preemption is in tension with *Travelers*, this case presents the opportunity to spell out the implications of the objective intent-oriented approach to ERISA preemption beyond the narrow health-cost containment context there presented.

Like *Travelers*, this is not a case in which the ERISA preemption question can be answered simply on the basis that the state law in question expressly makes a "reference to" ERISA plans. See *Travelers*, 115 S. Ct. at 1677. The only requirement for taking advantage of the sub-journey

level apprentice wage on California public works projects is that the apprentice in question be registered with the state through a recognized apprenticeship program meeting federally-specified criteria. Apprenticeship programs, both as commonly understood, and as described in 29 C.F.R. § 29.3-29.6, do not pay prevailing wages to any workers employed on public works. Contractors do. Thus, laws that set prevailing wages for public works projects do not deal with the administrative or financial workings of benefit plans at all. It is true, of course, that providing for a lower apprenticeship wage on public works projects only for registered apprentices may have the effect of encouraging employers to employ registered apprentices so that they will be able to save money. But *Travelers* makes clear, at the least, that as the form of state involvement becomes one not of mandating a preference for one employee benefit plan over another, but of creating economic incentives that may affect employer preferences, the presumption against preemption becomes stronger.

Although the Ninth Circuit apparently assumed that all the state-certified apprenticeship programs are ERISA-covered plans, and that the reference in the state law to such programs is therefore a reference to ERISA plans, in fact no such identity exists. Rather, as the United States Secretary of Labor previously explained to this Court in another case holding a state law preempted by ERISA because of ERISA's coverage of "apprenticeship or other training programs," § 3(1)(A), 29 U.S.C. § 1002(1)(A), Department of Labor regulations make clear that "neither on-the-job training nor classroom training paid for out of an employer's general assets is an ERISA plan." *Lenne v.*

Boise Cascade Corp., No. 91-707, Brief for the United States as Amicus Curiae on the Petition for Writ of Certiorari at 9, citing 29 C.F.R. § 2510.3-1(b)(3)(iv); 40 Fed. Reg. 24, 643; 29 C.F.R. § 2510.3-1(b); 29 C.F.R. § 2510.3-1(k); ERISA Advisory Opinions Nos. 76-01 and 83-32A; and *Massachusetts v. Morash*, 490 U.S. 107 (1989).¹⁰ Consequently, it is "not the case" that "any law relating to apprenticeship or training necessarily relates to covered plans only." *Id.* at 15. Rather, a state law that refers to apprenticeship plans generally "affects many programs not subject to ERISA," *id.*, and therefore cannot be deemed preempted as a law that singles out ERISA plans for special treatment. Compare *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988).

The question, here, as in *Travelers*, is whether the available legislative and historical materials as a whole indicate that the California apprentice prevailing wage provisions, typical of the majority of states, are within the "scope of state law that Congress understood would survive." *Travelers*, 115 S. Ct. at 1677. There are at least two reasons, which the Ninth Circuit did not look at here, and will not look at in the future under its analytical model for preemption, for finding that the law invalidated below is not a statute of the kind Congress intended to preempt.

¹⁰ As that Brief also noted, "[c]ongress included apprenticeship programs . . . in the definition of 'employee welfare benefit plan' because it was concerned with regulating trust funds established in providing training." *Id.* at 16. Here, the state law in question has no bearing on the financial aspects of providing apprenticeship training.

First, as *Travelers* recognized, Congress's basic objective in enacting ERISA's preemption provision was to eliminate conflicting regulation of pension and welfare benefit plans, not to supersede the historic powers of the states beyond the degree necessary to accomplish that uniformity. 115 S. Ct. at 1680 ("nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern").

Nothing in ERISA regulates substantively either wages (prevailing or otherwise) or the operative aspects of apprenticeship programs (such as the content of the training provided, the number of years apprentices serve, the ratio of journeypersons to apprentices, the procedural rules governing discharge from apprenticeship programs, etc.). On the other hand, like health care, both wages and the supervision and support of apprenticeship programs have been "historically . . . matter[s] of local concern," in the sense that state and local involvement in these areas was, at the time ERISA was passed, widespread and detailed.

In this instance, voiding California's authority to limit the application of special apprenticeship wages to registered apprentices not only interferes with the state's wage-setting authority on public works projects with respect to apprentices, but also eliminates any meaningful ability to establish wages for *any* workers on public works projects. See p. 17, *supra*, (explaining that under the decision below, contractors can successfully evade the prevailing wage laws entirely by designating any workers they please as apprentices).

Like both general wage regulation and the state's own public works, the governance of the substantive aspects of apprenticeship, has always been an area in which the states have been heavily involved.¹¹ Education generally has always been largely the province of state law, and apprenticeship programs developed initially as simply one way among many to provide young people with the training to succeed in the adult world of work. The history of apprenticeship particularly demonstrates that the states had long regulated both the wages and the working and training conditions of apprentices. As we have seen,¹² the federal Fitzgerald Act, enacted in 1937,

¹¹ It is important to note that, as *Morash* observed, interpreting ERISA to federalize an area of traditional state concern — there vacation wages, here wages and apprenticeship regulation — is to redirect disputes arising in those areas from state to federal dispute-resolution fora. California currently asserts jurisdiction over complaints by its 40,000 to 50,000 apprentices against their apprenticeship programs, Cal. Lab. Code § 3078(h), and accepts their wage complaints against employers under general wage dispute statutes. Cal. Lab. Code § 229. If all aspects of apprenticeship programs, including the wages paid to apprentices, are, as the opinion below implies, governed solely by federal law, the necessary effect is "vastly [to] expand the jurisdiction of the federal courts, providing a federal forum for any employee with a vacation grievance." *Morash*, 490 U.S. at 118-119.

¹² See, e.g., TO SAFEGUARD THE WELFARE OF APPRENTICES: HEARINGS ON H.R. 6025 BEFORE A SUBCOMM. OF THE COMM. ON LABOR, 75th Cong., 1st Sess. (1937); HOUSE COMM. ON LABOR, SAFEGUARD THE WELFARE OF APPRENTICES, H.R. Rep. No. 945, 75th Cong., 1st Sess. (1937) App. 107; 81 Cong. Rec. 6631 (1937). (Discussion between Representative Fitzgerald and Reps. Hoffman and Ditter) App. 111; G. ABBOTT, *The Child and the State*, Vol. I (1938).

was intended to build upon this major state role in delineating apprenticeship training and labor standards.

Given this historical, statutory, and regulatory background, neither § 514(a) nor ERISA's lack of substantive attention to apprenticeship can sensibly be understood as evidencing an Congressional intention to *preclude* states from attending to and supporting effective and successful on-the-job training of young people.¹³ Rather, the more appropriate conclusion is that Congress assumed that ERISA was *not* disturbing the long-standing arrangements for substantive encouragement of basic and adequate apprenticeship standards by states, which prevailed under the Fitzgerald Act.¹⁴ This conclusion is

¹³ Rules pertaining to public contracting, like wage and apprenticeship rules, are within an area of traditional state concern as to which it is at least unlikely the Congress intended widespread preemption. Cf. *Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190 (1993).

¹⁴ Both *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 505 U.S. 1204, 112 S. Ct. 2991 (1992) and *Southern California ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992) addressed the impairment of the Fitzgerald Act's aim of promotion of apprenticeship standards in the context of state approval of apprentice program standards. In brief, both decided (*So. Cal. ABC* relying, in part, on the district court opinion here) that ERISA preemption of state authority to approve would impair the Fitzgerald Act, and therefore preemption is prevented by the Savings Clause, whereas preemption of state requirements in excess of the Secretary of Labor's regulations would not.

In this case, no party has contended that the state laws applied in certifying the program in issue here in any way went beyond the requirements that the state was required to follow for federal recognition. Consequently, the issue of ERISA

reinforced by the fact that during consideration of ERISA and after its passage, those who would be most likely to know of Congress's intent in passing ERISA continued to assume that the federal state partnership remained a key component of the federal regulation of apprenticeship under the congressional mandate found in the Fitzgerald Act, and did not assume that the Secretary of Labor's state partners had lost authority.¹⁵

Second, where states wish to have effective prevailing wage laws, they have no practical way of *avoiding* some impact on apprenticeship plans. As explained previously, *supra*, pp. 16-18, the only real choice such states have is between *discouraging* apprenticeship on public works by failing to provide a lower-than-journey person wage rate; permitting employers to pay apprentice wage to anyone they please, thereby undermining the prevailing wage system entirely; or providing *some* basis for specifying

preemption's effect on state authority to impose requirements exceeding those in the federal regulations is not presented here.

¹⁵ See statements re substantive role of the states by the Secretary of Labor, charged with primary responsibility for enforcing both ERISA and the Fitzgerald Act in the Federal Register preceding the current final rule of 29 C.F.R. § 29, 38 Fed. Reg. 13,894 (1973) (to be codified at 29 C.F.R. pt. 29) (proposed May 25, 1973); 40 Fed. Reg. 11,340 (1975) (to be codified at 29 C.F.R. pt. 29) (proposed Mar. 10, 1975); 42 Fed. Reg. 10,138-10,139 (1977) (to be codified at 29 C.F.R. pt. 29), reprinted in App. 93-106; *Oversight Hearings on the National Apprenticeship Training Act, 1983: Hearings before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor, H.R., 98th Cong., 1st Sess. (1984)*; GAO Report, *Apprenticeship Training Administration, Use and Equal Opportunity* (1992); Lyndon B. Johnson School of Public Affairs, *Coordination of State and Federal Apprenticeship Administration*, Volume 2, (1980).

who may be paid at the lower, apprentice wage rate – namely, workers who are receiving actual training on a long-term basis. As noted previously, this same practical situation has resulted, on federal public works projects, in provisions regarding apprenticeship wages substantially identical to those here at issue. 29 C.F.R. § 5.5(a)(4). To the extent that the policy of simplicity and uniformity behind ERISA preemption informs the debate, that policy suggests that preemption should not result in mandating *different* rules regarding who is an apprentice, paid at apprenticeship wage rates, with state public works projects on one side and federal or joint federal state ones on the other. Nor is there any basis for supposing that in enacting ERISA Congress intended to preclude the states from reaching the practical solutions to public contracting issues permitted to the federal government.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated: November 16, 1995, San Francisco, California

Respectfully submitted,

JOHN M. REA, Chief Counsel,
(Counsel of Record)

VANESSA L. HOLTON,
Asst. Chief Counsel,

FRED D. LONSDALE, Sr. Counsel,

JAMES D. FISHER, Counsel,

SARAH COHEN, Counsel,

H. THOMAS CADELL, JR.,
Chief Counsel,

RAMON YUEN-GARCIA,
Counsel,

State of California
Department of Industrial
Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 972-8900

*Counsel for State Petitioners
Department of Industrial
Relations Division of
Apprenticeship Standards*

State of California
Division of Labor
Standards Enforcement
45 Fremont Street,
Suite 3220
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 975-2060

*Counsel for State Petitioners
Division of Labor Standards
Enforcement and County of
Sonoma*

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DILLINGHAM CONSTRUCTION N.A.,
INC., a California Corporation;
MANUEL J. ARCEO, dba SOUND
SYSTEMS MEDIA,

Plaintiffs-Appellants,

v.

COUNTY OF SONOMA; DIVISION OF
LABOR STANDARDS ENFORCEMENT;
DEPARTMENT OF INDUSTRIAL RELATIONS,
DIVISION OF APPRENTICESHIP
STANDARDS, et al.,

Defendants-Appellees.

No. 92-15247

D.C. No.
CV-90-01272-FMS

OPINION

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
April 14, 1993 – San Francisco, California

Filed June 7, 1995

Before: William C. Canby, Jr., and Melvin Brunetti, Circuit
Judges, and Robert E. Jones,* District Judge.

Opinion by Judge Brunetti

* Honorable Robert E. Jones, United States District Judge
for the District of Oregon, sitting by designation.

COUNSEL

Richard N. Hill, Littler, Mendelson, Fastiff, Tichy & Mathiason, San Francisco, California, for the plaintiffs-appellants.

Ramon Yuen-Garcia, Department of Labor Standards Enforcement, San Francisco, California, for the defendants-appellees.

John M. Rea, Department of Industrial Relations, San Francisco, California, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

The issue presented in this case is whether ERISA preempts the application of a state prevailing wage law that requires payment of prevailing wages to employees in apprenticeship programs that have not received state approval but allows the payment of lower apprenticeship wages to employees participating in state approved programs. We hold that it does.

I. CALIFORNIA APPRENTICESHIP REGULATIONS

As described by the district court, California's administrative framework for regulating apprenticeships is complex. Rules and regulations establishing minimum standards of wages, hours and working conditions for apprentices are created by the California Apprenticeship Council ["CAC"] which is located within the Division of

Apprenticeship Standards ["DAS"]. The California Code of Regulations provides that "[a]pprenticeship programs shall be established by written standards approved by the Chief of DAS" and sets forth a detailed list of program standards that must be covered before the program is approved. Cal.Code Regs. tit. 8, § 212.

The CAC exercises approval authority over apprenticeship programs pursuant to the Fitzgerald Act, 29 U.S.C. § 50 and its implementing regulations, 29 C.F.R. §§ 29.1-29.13. The federal regulations establish criteria under which a state agency may be recognized as the appropriate agency for registering local apprenticeship programs for federal purposes. 29 C.F.R. § 29.12.

Section 1771 of the California Labor Code requires state public works contractors to pay their employees "prevailing wages."¹

Contractors who are awarded public works projects agree to pay prevailing wages to all their construction employees at the journeyman level in specified trades. Public works contractors that employ apprentices can pay them an amount lower than the prevailing journeyman

¹ Section 1771 provides in part:

... not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed
... shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. . . .

Cal.Labor Code § 1771.

wage so long as those apprentices are part of an approved apprenticeship program under California Labor Code section 1777.5.²

Until employees on a public works project are enrolled in an apprenticeship program whose training and education standards meet state-established minimums, the prevailing wage statute requires that they be paid at higher, journeyman rates.

² Section 1777.5 provides in part:

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprenticeship agreements . . . are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state . . . employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee . . . for a certificate approving the contractor or subcontractor under the apprenticeship standards. . . . However, approval . . . shall be subject to the approval of the Administrator of Apprenticeship.

Cal.Labor Code § 1777.5.

II. FACTS AND PROCEEDINGS

Dillingham Construction was awarded a state public works contract to construct a detention facility in Sonoma County. The detention facility project was a public works project within the meaning of California Labor Code § 1720. Dillingham Construction subcontracted electric work to Sound Systems Media, a sole proprietorship of Manuel Arceo. Arceo was a member of the International Brotherhood of Electric Workers ("IBEW").

When Sound Systems began work on the job, it paid its employees in accordance with the collective bargaining agreement between the IBEW Local 202 and the National Electric Contractors Association which included a scale for apprentice electronic technicians and required Sound Systems to make contributions to the Northern California Sound and Communications Joint Apprenticeship Training Committees ("JATC"), a state approved JATC. JATCs are the source of the apprentices and provide for their training. However, after the job began, the IBEW Local 202 withdrew its representation of Sound System's electronics technician employees, leaving Sound Systems without a collective bargaining agreement to establish compensation. About a month after the IBEW's withdrawal, Sound Systems joined the Northern California Electrical Sound Communications Association ("NCESCA"), a multi-employer association of electrical contractors. NCESCA signed a collective bargaining agreement with the National Electronic Systems Technicians Union ("NESTU") which provided wage scales for all employees, including apprentices and covered Sound Systems' electronic technicians. NESTU was associated with the Electronic and Communications JATC, a new

JATC which had not been approved by the State when Sound Systems began relying on it for apprentices. (State approval was later received but is not retroactive.) Sound Systems paid its employees in compliance with this collective bargaining agreement. In some instances, the rates under the collective bargaining agreement were less than the state prevailing wage rates.

After an investigation, the DLSE issued a Notice Withholding Payment from Dillingham Construction with Sonoma County due to Sound System's failure to pay some of its workers prevailing wage rates in violation of California Labor Code § 1771. Dillingham Construction is liable for the acts of its subcontractors under California Labor Code § 1775.

Dillingham does not dispute that Sound Systems paid some of its workers less than the prevailing wages for journeymen, but claims that those workers were "apprentices" and that Sound Systems was entitled to pay them less than journeyman prevailing wage rates pursuant to the NESTU collective bargaining agreement. However, it is uncontested that the "apprentices" did not come from a state approved JATC.

In this action, the plaintiffs Dillingham Construction and Sound Systems Media (collectively referred to as "Dillingham") sought a declaratory judgment that the enforcement of California's journeyman prevailing wage rate pursuant to California Labor Code sections 1773-1777.1 was preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-58 and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and that by attempting to enforce it,

the State interfered with rights established under federal labor law, in violation of 42 U.S.C. § 1983.

On cross motions for summary judgment, the district court held that the California prevailing wage law is not preempted by the NLRA or ERISA and granted summary judgment in favor of the Division of Labor Standards Enforcement ("DLSE"), the County of Sonoma, and the Division of Apprentice Standards ("DAS") (collectively referred to as "the State"). We reverse.

A grant of summary judgment is reviewed de novo. *Hydrostorage Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719, 726 (9th Cir.1989), cert. denied, 498 U.S. 822 (1990). The parties agree that there are no disputed issues of material fact. Therefore, we need only determine whether the district court correctly applied the relevant law. *Id.*

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. The appeal was timely, and we have jurisdiction under 28 U.S.C. § 1291.

III. DISCUSSION

A. Estoppel

The state argues that because Dillingham voluntarily agreed to perform the contract in conformity with the requirements of the state prevailing wage law and apprenticeship standards, it is estopped from challenging the state laws on constitutional grounds. This issue was not raised before the district court and we refuse to consider it for the first time on appeal. *International Union*

of *Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

B. ERISA Preemption

We first consider the issue of ERISA preemption. "ERISA is a comprehensive remedial statute designed to protect the interests of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans." *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270, 272 (9th Cir.1991), cert. denied, 112 S.Ct. 2991 (1992) (quotations and citations omitted).

We have addressed the issue of ERISA preemption in relation to state apprenticeship programs in *Hydrostorage*, 891 F.2d 719, and *MacDonald*, 949 F.2d 270.

In *Hydrostorage*, the plaintiff was awarded a public works contract to construct a water storage tank for a county water district. The California Apprenticeship Council found the plaintiff in violation of California Labor Code section 1777.5, which required a contractor on a public works project to apply for a certificate of approval from a JATC, employ apprentices at a specified ratio and contribute to an appropriate fund. An administrative order was issued barring *Hydrostorage* from future public works contracts. The district court held that enforcement of the order was preempted by ERISA but the court did not strike down section 1777.5 as a whole, but only its application. We affirmed.

In *MacDonald*, we held that ERISA preempted Nevada's enforcement of its prevailing wage statute. Like

California's prevailing wage law, Nevada requires payment of prevailing wages on state public works projects but allows lower apprentice wages to be paid to apprentices from programs approved by the Nevada State Apprenticeship Council. In *MacDonald*, the plaintiff was required to pay prevailing wages to apprentices employed from an apprenticeship program which had received federal but not state approval. We found this application of Nevada's prevailing wage statute to be preempted by ERISA because the Federal Bureau of Apprenticeship and Training had already authorized the apprenticeship program at issue, yet the state asserted jurisdiction over and withheld approval of the same program pursuant to its own statutes and regulation.

These cases do not address the specific issue presented here of whether ERISA preempts the application of a state prevailing wage law that requires payment of prevailing wages to employees in apprenticeship programs that have not received state approval but allows the payment of lower apprenticeship wages to employees participating in state approved programs. However, the Tenth Circuit addressed this issue in *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir.), cert. denied, 113 S. Ct. 406 (1992). Relying in part on *Hydrostorage* and *MacDonald*, the Tenth Circuit concluded that ERISA does preempt this application of a state prevailing wage law.

In the case at hand, the district court followed the three part analysis we established in *Hydrostorage*. First, it found that Sound System's apprenticeship program constituted an "employee benefit plan" under ERISA. Next,

it held that the California approval scheme for apprenticeship programs "related to" the employee benefit plan and thus fell under ERISA's preemption clause. Finally, the court concluded that the application of the California approval scheme was saved from preemption by the ERISA savings clause, 29 U.S.C. § 1144(d). We address each of these findings in turn.

1. An ERISA "employee welfare benefit plan"

ERISA governs "employee benefit plans," which are statutorily defined as plans that are either an "employee welfare benefit plan," an "employee pension benefit plan," or both. 29 U.S.C. § 1002(3); *Massachusetts v. Morash*, 490 U.S. 107, 113 (1989).

29 U.S.C. § 1002(1) defines an ERISA employee welfare benefit plan as:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries . . . apprenticeship or other training programs. . . .

29 U.S.C. § 1002(1) (emphasis added).

The district court concluded that the program Sound Systems purported to establish through the Electronic and Communications JATC was an "apprenticeship or other training program" within the meaning of 29 U.S.C. § 1002(1). We agree.

This conclusion is consistent with our analysis in *Hydrostorage* that an apprenticeship program established for the purpose of providing apprenticeship training falls within the plain meaning of section 1002(1)'s definition of "employee welfare benefit plan." *Hydrostorage*, 891 F.2d at 728; see also *MacDonald*, 949 F.2d at 272 (reaching the same conclusion without explanation).

2. ERISA's preemption clause

ERISA contains a very broad preemption clause which provides:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter II of this chapter shall supercede any and all state laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a) (emphasis added).

ERISA's preemptive scope was intended by Congress to be as broad as its language suggests. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983) (citing H.R. Conf. Rep. No. 93-1280 p. 383 (1974)). The Supreme Court has noted that "[t]he pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan covered by ERISA." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).

The phrase "relates to" has also been broadly defined by the Court.

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Under this "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Pre-emption is also not precluded simply because a state law is not consistent with ERISA's substantive requirements.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) (citations omitted).

Our additional requirement, set out in *Hydrostorage*, 891 F.2d at 729, that a state law "purport to regulate" or "attempt to reach" the terms and conditions of an employee welfare benefit plan in order for it to be pre-empted was rejected by the Court in *Ingersoll-Rand*, where it noted:

Had Congress intended to restrict ERISA's pre-emptive effect to state laws purporting to regulate plan terms and conditions, it surely would not have done so by placing the restriction in an adjunct definition section while using the broad phrase 'relate to' in the pre-emption section itself. . . . Moreover, our precedents foreclose this argument. In *Mackey* the Court held ERISA pre-empted a Georgia garnishment statute that excluded from garnishment ERISA plan benefits. *Mackey [v. Lanier Collection Agency & Serv. Inc.]*, 486 U.S. 825, 828-29 n.2 (1988). Such a law clearly did not regulate the terms or conditions of ERISA-covered plans, and yet we found pre-emption.

Ingersoll-Rand, 498 U.S. at 141-42; see also, *National Elevator*, 957 F.2d at 1557 n.1.

However, the Court has made clear that there are some limits to the scope of ERISA preemption. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21.

We must determine whether the state's enforcement of its prevailing wage law against Dillingham "relates to" an ERISA plan. This is the correct inquiry because Dillingham challenges the state's effort to enforce its prevailing wage law. The district court considered instead whether the California apprenticeship approval requirements "related to" an ERISA plan.

In *Hydrostorage* we held that section 1777.5, requiring compliance with a state-approved ERISA plan, was specifically designed to affect employee benefit plans. 891 F.2d at 730. See *Mackey*, 486 U.S. at 829 ("[W]e have virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are pre-empted under § 514(a).").

The state argues that wage rate regulation is not preempted by ERISA. According to the state, the payment of wages is a traditional area of state regulation and is not an employee welfare benefit plan under ERISA. See *Morash*, 490 U.S. at 119. A similar argument was rejected in *National Elevator*, 957 F.2d at 1561. The Tenth Circuit pointed out that while the payment of wages alone does not give rise to an employee benefit plan, an apprenticeship training program is an employee benefit plan for

purposes of ERISA. *Id.* Therefore, as long as the prevailing wage law "relates to" an employee benefit plan, it need not constitute an employee benefit plan by itself.

The state argues that *Hydrostorage* should be differentiated because in *Hydrostorage*, the state mandated participation in an approved ERISA plan, while here the application of the prevailing wage law only encourages participation in an approved plan.

In *National Elevator*, the Tenth Circuit recognized this argument but found that like the statute in *Hydrostorage*, the application of a state's prevailing wage law to allow payment of lower apprenticeship wages to employees in approved apprenticeship programs "has the effect, and possibly the aim" of encouraging participation in state approved ERISA plans while discouraging participation in unapproved ERISA plans. *National Elevator*, 957 F.2d at 1559.

Given the Supreme Court's broad reading of ERISA's preemption clause we agree with the Tenth Circuit's conclusion that:

If a state is permitted to use a prevailing wage scheme to single out certain ERISA plans over other ERISA plans, the potential for abuse is great – a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans. . . . We hold that [the state's] ruling applying the state's prevailing wage law does "relate to" an employee benefit plan because the ruling's effects . . . are not "tenuous, remote, or peripheral." See *Shaw*, 463 U.S. at 100 n. 21.

Id. at 1561.

We conclude that the application of California's prevailing wage law in this case "relates to" an ERISA plan and thus falls under ERISA's preemption clause.

3. ERISA's savings clause

Federal laws and regulations issued under them are saved from ERISA preemption by the statute's "savings clause," which provides:

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any of the laws of the United States . . . or any rule or regulation issued under such law.

29 U.S.C. § 1144(d).

In *Shaw*, the Supreme Court held that a state law prohibiting discrimination in employee benefit plans on the basis of pregnancy was saved from ERISA preemption to the extent that it prohibited conduct unlawful under Title VII. *Shaw*, 463 U.S. at 102. However, this conclusion was based on the Court's finding that Title VII's enforcement scheme depended in part on state laws and that Title VII expressly preserves nonconflicting state laws. *Id.* at 101-102.

The Court noted that "ERISA's structure and legislative history . . . caution against applying [the savings clause] too expansively," and stated:

While [the savings clause] may operate to exempt provisions of state laws upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-

inclusive pre-emption provision and its enumeration of narrow specific exceptions to that provision makes us reluctant to expand [the savings clause] into a more general savings clause.

Id. at 104.

The issue presented in this case is whether a finding that the challenged application of California's prevailing wage law is preempted by ERISA would impair a federal law. The state argues that a finding of ERISA preemption would impair the federal Fitzgerald Act, which provides:

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. . . .

29 U.S.C. § 50 (emphasis added).

Pursuant to this enabling act, federal regulations have been promulgated at 29 C.F.R. § 29.1-29.13 (1988). These regulations "provide a 'detailed regulatory scheme defining apprenticeship programs and their requirements and establish a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the U.S. Dept. of Labor.'" *Hydrostorage*, 891 F.2d at 731 (quoting *Siuslaw Concrete Const. Co. v. Washington, Dept. of Trans.*, 784 F.2d 952, 956 (9th Cir. 1986)).

However, unlike Title VII, the Fitzgerald Act does not rely on state laws for enforcement and includes no clause "preserving" nonconflicting state laws. In *Hydrostorage*, we held the preemption of the state's attempt to enforce its apprenticeship standards did not impair the Fitzgerald Act or the regulations promulgated under it. We adopted the district court's reasoning, noting that "the regulations [under the Fitzgerald Act] relate only to eligibility for federal registration. Neither [the regulations] nor the Act itself contemplate enforcement mechanisms." *Hydrostorage*, 891 F.2d at 731.

The state argues that *Hydrostorage* should be read narrowly in light of our analysis in *MacDonald* where we noted that the federal regulations promulgated under the Fitzgerald Act provide "for a dual system of approval and recognition so that either" a federal or state apprenticeship council can approve an apprenticeship program for federal purposes. *MacDonald*, 949 F.2d at 273. The court in *MacDonald* held that the state's refusal to approve an apprenticeship program, pursuant to its own statutes and regulation, which had already been federally approved, went beyond the requirements of the Fitzgerald Act and was therefore not saved from ERISA preemption. However, the state reads *MacDonald* as implying that state apprenticeship standards are established under the Fitzgerald Act and that unless they require compliance with independent state standards apart from those set forth in the federal regulations under the Fitzgerald Act, they are saved from preemption.

We do not read *MacDonald* this broadly. As the Tenth Circuit concluded in *National Elevator*, the Fitzgerald Act "does not depend upon states to enforce its provisions; in

fact, there is nothing in [the Fitzgerald Act] for the states to enforce. [The Fitzgerald Act] merely seeks to facilitate development of apprenticeship programs – it does not mandate apprenticeship programs or seek to discourage other training programs.” *National Elevator*, 957 F.2d at 1562. We conclude that even if the application of the prevailing wage law is in the furtherance of the objectives of the Fitzgerald Act, it is not an enforcement mechanism of federal law, and to the extent that its enforcement in this case is preempted by ERISA, federal law is not impaired. Therefore, the state’s application of its prevailing wage law in this case is preempted by ERISA.

Because we find ERISA preemption, we do not address the NLRA preemption issue.

C. Proprietary Function of the State

The State argues that its actions in this case should be exempt from preemption both because it is acting as a market participant and because it is acting in its proprietary function rather than as a regulator in requiring Dillingham to pay prevailing wages.

We rejected a similar market participant argument in *Hydrostorage*. Although the underlying contract was a public works contract, we found that:

California in this case is not acting merely as a “market participant” rather than a regulator. The state’s involvement does not end with the awarding of the contract. Section 1777.5 is aimed at regulating contractors who work on public contracts. The Division [of Apprenticeship Standards], part of a state agency, monitors

and enforces violations of section 1777.5. This amounts to regulation, not merely “market participation.”

891 F.2d at 730.

Hydrostorage relied in part on *Wisconsin Dept. of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282 (1986). In *Gould*, the Supreme Court held that a state statute debarring three-time violators of the NLRA from doing business with the state was preempted by the NLRA. The Court rejected a market participant argument, stating: “the ‘market participant’ doctrine reflects the particular concerns underlying the Commerce Clause, not any general notions regarding the necessary extent of state power in areas where Congress has acted. . . . What the Commerce Clause would permit the States to do in the absence of the NLRA is . . . an entirely different question from what States may do with the Act in place.” *Id.* at 289-90.

The state argues that *Associated Builders & Contractors, Inc. v. City of Seward*, 966 F.2d 492 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1577 (1993) narrows *Hydrostorage* and our interpretation of *Gould*. In *City of Seward*, the court applied *Gould*, but found that the City was acting purely as a market participant when it required the winning bidder on a public works project to comply with a work-preservation clause in the City’s contract. The work-preservation clause limited bidding on the project to contractors who agreed to enter an agreement with a union representing workers at a city-owned electric utility. The court stated:

the City of Seward, unlike the State of Wisconsin in *Gould* . . . was not driven by regulatory concerns, but by legitimate management concerns that may lead any employer, public or private, to agree to a work preservation clause.

Id. at 496.

The state also contends that the recent Supreme Court case of *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Mass./Rhode Island*, 113 S. Ct. 1190 (1993), supports its argument that no preemption should be found if a state is acting as a proprietor rather than as a regulator. In *Associated Builders*, a state agency hired a private firm to work as its project manager in its clean up of Boston Harbor. The firm negotiated an otherwise lawful prehire collective bargaining agreement which required (among other things) that all employees agree to be bound by the terms of the agreement and agree to become union members. The purpose of the agreement was to provide stability over the life of the project. The Court held that the NLRA did not preempt the agreement because the state was acting as a proprietor or owner of the construction project and its acts were not tantamount to regulation or policy making. *Id.* at 1196.

When we say that the NLRA pre-empts state law, we mean that the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see *Machinists*, or for NLRB jurisdiction, see *Garmon*. A State does not regulate however, simply by acting within one of these protected areas. When a State owns and manages property . . . it must interact with

private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state regulation.

Id. (emphasis added).

Both *City of Seward* and *Associated Builders* are NLRA cases. The NLRA contains no preemption clause. As the Court recognized in *Associated Builders*, a state's actions are only subject to preemption under the NLRA if it is regulating in a protected zone. *Id.* ERISA, on the other hand, contains a broad preemption clause under which any state law which "relates to" an employee benefit plan is preempted. See, e.g., *Ingersoll-Rand*, 498 U.S. at 139.

Additionally, these cases do not undermine the validity of our finding in *Hydrostorage* that the state in that case was not acting as a market participant. In *Hydrostorage*, we specifically found that the state was not acting merely as a market participant but that its enforcement of conditions of apprenticeship was aimed at regulating contractors who work on public contracts. This case is similar to *Hydrostorage*. The state's application of its prevailing wage law to require that apprentices in programs not approved by the state be paid higher wages than those in state-approved programs has the "effect and possibly the aim" of encouraging participation in a state-approved ERISA plan. *National Elevator*, 957 F.2d at 1559. Therefore, we conclude that the state's action in enforcing its prevailing wage law in this case goes beyond that of a mere market participant and is preempted by ERISA.

D. Damages Under 42 U.S.C. § 1983

Dillingham argues that it is entitled to an award of damages under 42 U.S.C. § 1983 because the state has deprived it of a federal right secured by the NLRA. Since we base reversal on a finding of ERISA preemption, we do not reach the issue of whether a finding of NLRA preemption would entitle Dillingham to recover damages under 42 U.S.C. § 1983. Additionally, we hold that Dillingham is not entitled to attorney's fees under 42 U.S.C. § 1988 because Dillingham has shown no right under section 1983 in ERISA which it has sought to enforce.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DILLINGHAM CONSTRUCTION)	
N.A., Inc., a California corporation,)	
and Manuel J. Arceo, d/b/a)	
SOUND SYSTEMS MEDIA,	)	No.
Plaintiffs,	)	C 90-1272 FMS
	)	JUDGMENT
vs.	)	(Filed
COUNTY OF SONOMA;	)	Dec. 11, 1991)
DEPARTMENT OF INDUSTRIAL)	
RELATIONS, DIVISION OF LABOR)	
STANDARDS ENFORCEMENT and)	
DIVISION OF APPRENTICESHIP)	
STANDARDS, administrative)	
agencies of the State of California;)	
GAIL W. JESSWEIN, in his official)	
capacity as Chief of the Division of)	
Apprenticeship; and JAMES CURRY,)	
in his official capacity as Labor)	
Commissioner,)	
Defendant.)	

For the reasons set forth in this Court's Order Granting Summary Judgment for Defendants dated December 11, 1991, judgment is hereby entered in favor of defendants and against plaintiffs.

The Clerk is directed to close the file.

SO ORDERED.

DATED: December 11, 1991

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DILLINGHAM CONSTRUCTION)	
N.A., Inc., a California corporation,)	
and Manuel J. Arceo, d/b/a)	
SOUND SYSTEMS MEDIA,	)	No.
	)	C 90-1272 FMS
Plaintiffs,)	
	)	ORDER
vs.	)	GRANTING
	)	SUMMARY
COUNTY OF SONOMA;	)	JUDGMENT
DEPARTMENT OF INDUSTRIAL	)	FOR
RELATIONS, DIVISION OF LABOR	)	DEFENDANTS
STANDARDS ENFORCEMENT and)	
DIVISION OF APPRENTICESHIP	)	(Filed
STANDARDS, administrative	)	Dec. 11, 1991)
agencies of the State of California;)	
GAIL W. JESSWEIN, in his official)	
capacity as Chief of the Division of)	
Apprenticeship; and JAMES CURRY,)	
in his official capacity as Labor)	
Commissioner,)	
)	
Defendant.)	

INTRODUCTION

At issue in this case is the State of California's authority to establish and enforce minimum employment standards for apprentices. The State of California (the "State") requires that public works contractors who employ apprentices employ only those apprentices who participate in apprenticeship programs with state-approved standards. Defendants in this case include two state agencies which enforce apprenticeship standards; the head of each of those agencies; and the County of

Sonoma. All defendants maintain that the State has the authority to establish and enforce minimum employment standards. Based on this authority, defendants have withheld money from plaintiffs for non-compliance with prevailing wage requirements that relate to apprentice status. Defendants have moved for summary judgment.

The plaintiffs, Dillingham Construction and Manuel J. Arceo, d/b/a Sound Systems Media ("Sound Systems"), argue that the State may not interfere in the collective bargaining process by trying to define apprentices. Plaintiffs claim that defendants' reasons for withholding the money are preempted by the Employee Retirement Income and Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1381 ("ERISA") and/or the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). Plaintiffs have also moved for summary judgment.

For the reasons set forth below, defendants' Motion for Summary Judgment is GRANTED, and plaintiffs' Motion for Summary Judgment is DENIED.

BACKGROUND

Defendant County of Sonoma requested bids for the construction of a detention facility, known as the Sonoma County Main Adult Detention Facility (the "Project"). In the Spring of 1987, plaintiff Dillingham Construction won the construction contract and became the general contractor for the Project. The electronic installation work was subcontracted to co-plaintiff Manuel J. Arceo, d.b.a. Sound Systems Media ("Sound Systems").

Sound Systems asked Sonoma County for a determination of the appropriate prevailing rates applicable to all work on the Project.¹ Sonoma County gave Sound Systems the rate information requested, and Sound Systems claims that it paid its employees at or above the applicable prevailing rates.

When Sound Systems began work on the Project, it was signatory to a collective bargaining agreement with International Brotherhood of Electrical Workers ("IBEW") Local 202. The collective bargaining agreement included a scale for apprentice electronic technicians and required Sound Systems to make contributions to the Northern California Sound and Communications Joint Apprenticeship Training Committee ("No. Cal. JATC"). Joint Apprentice Training Committees ("JATCs" or "JACs") are the source of apprentices and provide for their training. The No. Cal. JATC was a state-approved JATC. In May 1988, a few months after Sound Systems began working on the project, IBEW Local 202 withdrew its representation of the electronics technician employees of Sound Systems.

In June of 1988, Sound Systems entered into a new collective bargaining agreement with the National Electronic Systems Technicians Union ("NESTU"). The NESTU agreement covered Sound Systems' electronic technicians and included a scale of wages for apprentices. NESTU was associated with a new JATC, the Electronic and Communications Systems Joint Apprenticeship and

¹ The detention facility project was a public works project within the meaning of California Labor Code section 1720.

Training Committee ("E & C JATC"). The E & C JATC had not yet been approved by the state when Sound Systems began relying on it for apprentices to work on the Project. This is the transgression that created the present litigation. The E & C JATC applied for state approval in August of 1989 and received it in October 1990. The approval was not retroactive.

On March 14, 1989, the IBEW Local 551 filed a complaint against Sound Systems with the Division of Apprenticeship Standards ("DAS") of the California Department of Industrial Relations ("DIR"), an administrative agency, alleging violations of California Labor Code section 1777.5, which concerns apprenticeship programs. Although IBEW Local 551 withdrew its complaint, defendant DAS issued a notice of noncompliance to plaintiffs Dillingham Construction and Sound Systems, and the Division of Labor Standards Enforcement issued a Notice To Withhold. The Notice directed the County of Sonoma to withhold monies from Dillingham based on Sound Systems' violations. The basis for the Notice was that plaintiffs had paid some of their workers less than prevailing wages, in violation of Labor Code section 1771. The amount of money withheld equaled the unpaid wages and penalties for failure to pay such wages.

Plaintiffs do not dispute that Sound Systems paid some of its workers less than the prevailing wages for journeymen, but claim that those workers were apprentices and that Sound Systems was entitled to pay those individuals less than journeyman prevailing wage rates, pursuant to the NESTU collective bargaining agreement.

Defendants' basic argument is that there were no apprentices working for Sound Systems because there were no "apprentices" listed on Sound Systems' payroll worksheets; more importantly, there was no approved JAC from which Sound Systems could hire "apprentices". Since there were no true "apprentices",² all employees should have been paid the prevailing wage for journeymen.³

California's administrative framework for regulating apprenticeships is complex. Rules and regulations establishing minimum standards of wages, hours, and working conditions for apprentices are created by the California Apprenticeship Council ("CAC") under the authority of California Labor Code section 3071 and promulgated at title 8 of the California Code of Regulations (§§ 200 *et seq.*) The CAC is located within the DAS. Section 212 of

² An apprentice is defined as "a person at least 16 years of age who has entered into a written agreement, in this chapter called an 'apprentice agreement', with an employer or program sponsor. The term of the apprenticeship for each apprenticeable occupation shall be approved by the chief, and in no case shall provide for less than 2,000 hours of reasonably continuous employment for such person and for his or her participation in an approved program of training through employment and through education in related and supplemental subjects." Cal. Lab. Code § 3077 (West 1989).

³ State-recognized apprentices have entered into apprenticeship agreements with JATCs to ensure apprentices proper training. There is no evidence in the record of apprenticeship agreements here, nor evidence that Sound Systems' "apprentices" received any training. *See* Declaration of M. Arceo at 4: "Installer apprentices receive no formal electronic training and engage in cable pulling tasks such as speaker hanging". Cable pulling is not an apprenticeable trade.

the regulations provides that "[a]pprenticeship programs shall be established by written standards approved by the Chief of DAS" and sets forth a detailed list of program standards that must be covered before the program is approved. Cal. Code Regs tit. 8, § 212.

The CAC exercises approval authority over apprenticeship programs pursuant to the Fitzgerald Act, 29 U.S.C. § 50, and its implementing regulations, 29 C.F.R. §§ 29.1 - 29.13. The federal regulations establish criteria under which the Bureau of Apprenticeship and Training (BAT) of the United States Department of Labor may recognize a State agency as the appropriate agency for registering local apprenticeship programs for federal purposes. 29 C.F.R. § 29.12. The CAC has at all times relevant to this action been formally recognized by the BAT as authorized to register and approve apprenticeship programs pursuant to the Fitzgerald Act and its regulations.⁴

Plaintiffs assert that California's prevailing wage and apprenticeship standards are preempted by ERISA and the NLRA. This Court finds that the wage and apprenticeship standards at issue here, and the DAS's enforcement of them, are not preempted by either of these statutes.

PROCEDURAL POSTURE

This Court has jurisdiction under 28 U.S.C. § 1331. Federal courts have jurisdiction over suits to enjoin state

⁴ The federal regulations also provide for the BAT directly to register apprenticeship programs as conforming with federal standards for federal purposes. 29 C.F.R. § 29.3.

officials from interfering with federal rights. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 88 n. 14 (1983) citing *Ex parte Young*, 209 U.S. 123, 160-62 (1908); see also *Hydrostorage Inc. v. Northern California Boilermakers*, 891 F.2d 719, 724-25 (9th Cir. 1989), cert. denied, 111 S. Ct. 72 (1990).

The issue before the Court is the requirement that public works contractors who use apprentices use only those from state approved apprenticeship programs. The legality or illegality of the approval requirement in the face of the preemption arguments is dispositive.

Although the parties disagree as to whether or not plaintiffs employed "apprentices," they do agree that plaintiffs did not employ apprentices from a State approved program. There being no material facts in dispute, summary judgment is appropriate. Fed. R. Civ. P. 56 (c).

ANALYSIS

Plaintiffs base their motion for summary judgment on two theories: 1) apprenticeship standards constitute an employee welfare benefit plan; as such, state laws regulating such standards are preempted by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1381 ("ERISA"); and 2) state mandated prevailing wage rates in excess of collectively bargained-for wage rates are not true minimums and, therefore, are preempted by the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA").

A. ERISA Preemption

Plaintiffs present a rather simple syllogism in support of their ERISA preemption argument: 1) ERISA preempts all state laws relating to employee welfare benefit plans; 2) California's apprenticeship standards are employee welfare benefit plans; 3) ERISA, therefore, preempts California laws relating to apprenticeship standards. In support of this argument, plaintiffs cite *Hydrostorage, Inc. v. Northern California Boilermakers*, 891 F.2d 719 at 728. The Court finds that *Hydrostorage* settles the two premises of this analysis, but does not dictate the proffered conclusion.

The plaintiff in *Hydrostorage* was awarded a public works contract to construct a water storage tank for a county water district. Plaintiff neither applied to the relevant Joint Apprenticeship Committee (JAC) for certificate of approval nor employed any apprentices on the project. *Hydrostorage*, 891 F.2d at 722-23. Investigating a complaint, the Director determined that a violation had occurred. The determination was appealed to, and affirmed by, the CAC, which agreed that plaintiff had violated section 1777.5.

According to Cal. Lab. Code section 1777.5, California contractors working on public works contracts, with certain exceptions not relevant here, must:

- (1) "apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training

of apprentices in the area or industry affected"; (2) employ apprentices in a ratio of no less than one apprentice for every five journeymen; and (3) contribute to the fund or funds in each craft or trade in which [the contractor] employs journeymen or apprentices on the public work. . . .

Hydrostorage, 891 F.2d at 722, citing Cal. Lab. Code § 1777.5. *Hydrostorage* violated section 1777.5 by failing to apply for a certificate of approval, failing to employ apprentices, and failing to contribute to the appropriate fund. *Hydrostorage*, 891 F.2d at 722-23. The DAS, as affirmed by the CAC, issued an administrative order barring *Hydrostorage* from future public works contracts. The district court found enforcement of the order preempted by ERISA. The Ninth Circuit affirmed.

The Ninth Circuit's three-part analysis of ERISA preemption in *Hydrostorage* is instructive. That court considered: (1) whether the standards at issue fell within ERISA's regulatory scope; (2) whether ERISA's preemption clause reached state laws relating to the same standards; and (3) whether ERISA's savings clause for federal laws saved the standards from ERISA preemption.

1. ERISA Employee Welfare Benefit Plans

In *Hydrostorage*, the Ninth Circuit first considered whether the CAC-approved apprenticeship standards established by the Northern California Boilermakers' JAC constituted an ERISA "employee welfare benefit plan." 891 F.2d at 728. The JAC's standards consisted of the minimum qualifications for apprentices, the maximum

ratio of apprentices to journeymen, the terms and conditions of apprenticeships and the hours and wages of apprentices. *Id.*, at 728. The court found that, because ERISA expressly defines "employee welfare benefit plan" to include apprenticeship and training programs established by "an employer or . . . employee organization, or . . . both," 29 U.S.C. § 1002(1),⁵ the JAC's standards constituted an ERISA employee welfare benefit plan. *Hydrostorage*, 891 F.2d at 728.

The *Hydrostorage* analysis is relevant here because the program that Sound Systems purported to establish was an "apprenticeship or other training program" within the meaning of 29 U.S.C. section 1002(1).

2. ERISA's Preemption Clause

Second, the Ninth Circuit in *Hydrostorage* addressed whether or not the administrative order fell within ERISA's preemption clause. *Id.* at 729. ERISA's preemption clause provides:

[T]he provisions of this subchapter . . . shall supersede any and all *State laws* insofar as they

⁵ Section 1002(1) defines an ERISA employee welfare benefit plan as "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, . . . or vacation benefits, apprenticeship or other training programs. . . ." *Id.* (emphasis added).

may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a) (emphasis added). Holding that the administrative order fell within ERISA's definition of "State laws,"⁶ the court further found that it "relates to" an ERISA employee benefit plan. *Hydrostorage*, 891 F.2d at 729-30. A state law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987), citing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983).

In addition to requiring that an administrative order be a "state law" that "related to" an ERISA plan, the court said that the order must also "purport to regulate" directly or indirectly an ERISA plan before it is preempted. *Id.* at 729. A state law "purports to regulate" a plan if it "attempts to reach in one way or another the terms and conditions of employee benefit plans." *Id.* at 729, quoting *Local Union 598 v. J.A. Jones Constr. Co.*, 846 F.2d 1213, 1218 (9th Cir.) *aff'd* 488 U.S. 881 (1988). The *Hydrostorage* court held that the DAS order and § 1777.5, the underlying statute upon which it was based, were "specifically designed to affect employee benefit plans." *Hydrostorage*, 891 F.2d at 730. While the court held that the administrative order fell within ERISA's preemption

⁶ State means "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly the terms and conditions of employee benefit plans . . ." 29 U.S.C. § 1144(c)(2).

clause, *id.*, it did not extend its analysis to section 1777.5 itself. *Id.*, at 732.

Here, California's approval scheme for apprenticeship programs lies within the reach of ERISA's preemption clause. State approval is required so that plaintiff will be bound by the State's apprenticeship standards *vis-a-vis* an approved JAC; therefore, the approval requirement appears to "relate to" an ERISA plan. Furthermore, the State's approval requirement "purports to regulate" an ERISA plan by requiring review of the terms and conditions of apprenticeship standards. ERISA, however, "does not regulate the substantive content of welfare-benefit plans." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985).

3. ERISA's Savings Clause

As a third and final step in its analysis, the Ninth Circuit in *Hydrostorage* considered the State's contention that, even if the programs at issue fell within the broad language of ERISA's preemption provision, ERISA's savings clause protected it from preemption. ERISA's saving clause provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under such law." 29 U.S.C. § 1144(d).

Congress has spoken to the relationship between the states and apprenticeship standards in the Fitzgerald Act:

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, . . . to bring

together employers and labor for the formulation of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. . . .

29 U.S.C. § 50 (emphasis added).

The federal regulations promulgated under the Fitzgerald Act are set forth at 29 C.F.R. §§ 29.1-29.13. Those regulations provide "a detailed regulatory scheme defining apprenticeship programs and their requirements, and establish a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the United States Department of Labor." *Siuslaw Concrete Constr. Co. v. Washington Dep't of Transp.*, 784 F.2d 952, 956 (9th Cir. 1986).

In *Hydrostorage*, the Ninth Circuit rejected the State's argument that ERISA's "savings clause," through the Fitzgerald Act, saved from preemption its requirement that public works contractors hire apprentices and perform all the attendant responsibilities. *Hydrostorage*, 891 F.2d at 731-32. The court adopted the district court's conclusion that "by no stretch of the imagination could § 1777.5 be considered a state law the preemption of which would impair federal law:"

The implementing regulations [of the Fitzgerald Act] state that their purpose is "to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerned with the registration, for certain Federal purposes, [of] acceptable apprenticeship programs. 29 C.F.R. § 29.1(b).

Thus the regulations relate only to eligibility for federal registration. Neither [the regulations] nor the Act itself contemplate enforcement mechanisms. . . . Assuming § 1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired.

Hydrostorage, 685 F. Supp. at 722 (N.D. Cal. 1988). The Fitzgerald Act neither "articulate[s] a 'goal of encouraging joint state/federal enforcement' " nor "contain[s] a clause which preserves state laws." *Hydrostorage*, 891 F.2d at 732.

The Ninth Circuit recently clarified the extent to which ERISA's savings clause protects from preemption state laws regulating apprenticeships in *Electrical Joint Apprenticeship Committee, et al. v. MacDonald*, No. 90-15095 (9th Cir. November 8, 1991). There, the court considered the State of Nevada's enforcement of its prevailing wage statute governing state public works projects, which exempts apprentice programs approved by the Nevada State Apprenticeship Council (SAC), but does not exempt programs already approved directly by the federal BAT. Though the Court found the state's effort to subject BAT-approved apprenticeship programs to state SAC approval requirements preempted by ERISA, its opinion makes clear that, notwithstanding the sweeping language of *Hydrostorage*, the states can continue to exercise roles in apprenticeship regulation that are not preempted by ERISA.

The court in *MacDonald* found that ERISA's savings clause saves from preemption the Fitzgerald Act, and further explained that

[t]here is no exemption from the broad preemption provision of section 514(a) of ERISA *except for the federal Fitzgerald Act and the regulations issued thereunder* . . . Thus, any state regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by section 514(a) of ERISA.

Id. at 15249 (emphasis added). The court also made clear that both the BAT and the federally-authorized state agencies exercise non-preempted approval functions under the Fitzgerald Act and its regulations:

29 C.F.R. § 29.3 provides for a dual system of approval and recognition so that either the BAT or the State Apprenticeship Council can approve an apprenticeship program for federal purposes. However, either agency is constrained in its approval to apply the requirements and standards of the federal regulations.

Id. at 15248. Because the BAT had already authorized the apprenticeship program at issue, yet the SAC asserted jurisdiction over and withheld approval of the same program pursuant to its own statutes and regulations, the state was, in essence, stepping outside the Fitzgerald Act spotlight into the pervasive darkness of ERISA preemption. *Id.* at 15249-50.

Here, we are not concerned only with the state's effort to force a public works contractor to establish an ERISA plan, as in *Hydrostorage*, or with a conflict between

federal and state approvals, as in *MacDonald*. We are concerned with a state's right to require employers who wish to pay employees apprentice wages, thereby benefiting from a limited exemption from the state's hour-and-wage laws, to obtain prior state approval of their apprenticeship programs.

The State approval requirement insures the integrity of apprenticeship programs and protects the public and would-be apprentices from fraudulent programs which result in inadequately-trained or abandoned apprentices. The Court finds that this purpose falls squarely within the state's delegated jurisdiction under the Fitzgerald Act as articulated in the Fitzgerald Act itself and in its regulations:

The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain [sic] Federal purposes, of acceptable apprenticeship programs with the U.S. Department of Labor. . . . These labor standards, policies and procedures cover the registration, cancellation and deregistration of apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matters relating thereto.

29 C.F.R. § 29.1. Preemption of the state approval requirement would unquestionably impair the purposes of the Fitzgerald Act and its regulations within the meaning of

ERISA's savings clause.⁷ Therefore, the state approval requirement is saved from preemption.⁸

California's authority to establish and enforce minimum apprenticeship standards is, for these reasons, saved from ERISA preemption.

B. NLRA Preemption

Defendants withheld monies from plaintiff Dillingham on the basis that plaintiff Sound Systems paid

⁷ In addition, several other laws of the United States acknowledge and accommodate the validity of State apprenticeship standards. See 42 U.S.C. § 1257 (National and Community Service Act of 1990, limiting the use of certain benefits to those covering "expenses incurred in the fulltime participation in an apprenticeship program approved by the appropriate State agency"); 20 U.S.C. § 2331, 2382 and 2471 (state apprenticeship programs and vocational education); 23 U.S.C. § 140(a) (state apprenticeship programs and federal highways); 38 U.S.C. § 1787(a)(1) (state apprenticeship programs and veterans). Because it finds that the Fitzgerald Act saves the state approval requirement from preemption, the Court does not reach whether ERISA preemption would impair any of these other laws.

⁸ Supplemental authority submitted by the plaintiffs is distinguishable from the instant case, because, *inter alia*, those courts never reached a savings clause analysis. See, e.g., *Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991) (reversing district court finding that apprenticeship ratio regulations did not constitute an ERISA benefit plan); *Carpenters S. California Admin. Corp. v. El Capitan Dev. Co.*, 53 Cal. 3d 1041 (1991) (holding preempted a statute which created liens on real property for the benefit of collectively bargained trust funds); *Associated Builders and Contractors v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991) (finding preemption of local ordinances regarding per diem wages on private works).

less than prevailing wage to some of its employees. Those prevailing wage rates are above the rates set for apprentices in the NESTU collective bargaining agreement, to which Sound Systems is a party. Plaintiffs contend that defendants are preempted by the National Labor Relations Act from enforcing the prevailing wage rates, because the rates interfere with the collective bargaining process. Defendants, on the other hand, assert that the prevailing wage issue is linked to the apprenticeship approval requirement. The requirement incorporates minimum labor standards and is therefore not preempted by the NLRA. For the reasons set forth below, the Court finds that the State's minimum apprenticeship labor standards are not preempted by the NLRA.

Unlike ERISA, the NLRA contains no statutory preemption provision. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). Notwithstanding the NLRA, "[s]tates possess broad authority under their police powers to regulate the employment relationship within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." *Id.* at 756, quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976). Cf. *Siuslaw Concrete Constr. Co. v. Washington Dep't of Transp.*, 784 F.2d 952, 958 (9th Cir. 1986) (upholding state law mandating higher minimum wage rates for trainees than provided under federal law: "[t]he Washington statute is a minimum wage law enacted by the State as an exercise of its police power.")

The Supreme Court, however, has articulated two distinct NLRA preemption principles. *Metropolitan Life*, 471 U.S. at 748. First, there is the so-called *Garmon* rule,

which "protects the primary jurisdiction of the NLRB [National Labor Relations Board] to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA." 471 U.S. at 748, citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). The second is the *Machinists* principle, which

protects against state interference with policies implicated by the structure of the [NLRA] itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated. The doctrine was designed, at least initially, to govern pre-emption questions that arose concerning activity that was neither arguably protected against employer interference [citation], nor arguably prohibited as an unfair labor practice [citation]. Such action falls outside the reach of *Garmon* pre-emption.

471 U.S. at 749, citing *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); see also *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 529-531 (1979). Neither of the two theories preempt the State from establishing and enforcing minimum apprenticeship standards.

Plaintiffs claim that *Garmon* preemption is present here because workers' wage rates are governed by the collective bargaining process and protected by section 7 of the NLRA. Section 7 of the NLRA provides:

Employees shall have the right to selforganization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted aid or protection, and shall also have

the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

29 U.S.C. § 157. *Garmon* held that:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [NLRA] . . . due regard for the federal enactment requires that state jurisdiction must yield.

Garmon, 359 U.S. at 244.⁹

The key to plaintiffs' NLRA preemption argument is not *Garmon* itself, but a Ninth Circuit decision applying *Garmon*: *Bechtel Constr., Inc. v. United Bhd. of Carpenters*, 812 F.2d 1220, 1225 (9th Cir. 1987). *Bechtel*, however, is distinguishable.

In *Bechtel*, the Bechtel Construction company contracted to provide construction maintenance at the San Onofre Nuclear Generating Station (apparently a private

⁹ In *Garmon*, the NLRB had declined to exercise jurisdiction over the dispute in question, after which the state courts had assumed jurisdiction. The Supreme Court held that the "refusal of the [NLRB] to assert jurisdiction did not leave with the States power over activities they otherwise would be pre-empted from regulating," 359 U.S. at 238, so that the state courts' assumption of jurisdiction was improper. As the Supreme Court explained in *Metropolitan Life*, the purpose of the *Garmon* rule is to protect the primary jurisdiction of the NLRB. *Metropolitan Life*, 471 U.S. at 748.

works project). Bechtel was signatory to a national agreement between the General Presidents Committee ("GPC") and various maintenance contractors. The agreement was known as the "GPPM agreement" and applied to the San Onofre project. The GPPM agreement did not discuss wage rates or terms of employment for apprentices, yet the San Onofre project employed apprentices.

The San Onofre apprentices were to be trained by the contractor pursuant to an Apprenticeship Agreement. Bechtel and the local JAC signed the Apprenticeship Agreement, which was then approved by the Division of Apprenticeship Standards ("DAS"). The agreement incorporated "all Apprenticeship Standards of the Division, including wage rates." *Bechtel*, 812 F.2d at 1221 (emphasis added).

During the performance of the contract, Bechtel announced that it sought a wage reduction at San Onofre. Without seeking to modify the Apprenticeship Agreement, Bechtel received approval for its proposed reduction from the GPC and, thereafter, reduced all wage rates — including the apprentices'. Several apprentices filed complaints with the Division of Labor Standards Enforcement ("DLSE") seeking due and unpaid wages. In response, Bechtel filed an action in the district court seeking declaratory and injunctive relief. The district court found, and the Ninth Circuit affirmed, that "under California law, state minimum wage standards for apprentices do not apply where there is a collective bargaining agreement. . . ." *Id.* at 1222.

The Ninth Circuit's opinion addressed, first, whether California's apprenticeship wage standards were legal

minimums, *id.* at 1222-25, and second, the NLRA's preemptive effect on state agencies attempting to enforce apprenticeship standards. *Id.* at 1225-26.

In the first part of its opinion, the court held that the apprentice wage standards were not legal floors and the State had no jurisdiction over claims for unpaid wages arising under collective bargaining agreements. *Id.* at 1223-24. The court carefully distinguished the issue before it from the "legal minimum" exception to NLRA preemption articulated in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), wherein the Court held that "[w]hen a state law establishes a minimal employment standard not inconsistent with the federal legislative goals of the NLRA, it conflicts with none of the purposes of the Act." *Id.* at 757.¹⁰

The apprenticeship wage standards in *Bechtel* were not true legal minimums in the *Metropolitan Life* sense, because "California law places the collective bargaining agreement over the Approved Standards for Apprentices in setting wages for apprentices. . . . 812 F.2d at 1225 (emphasis added). According to the *Bechtel* court, California's regulations and statutes suggest that "wage progression schedules" or "wage scales" should be in accordance with and secondary to collective bargaining agreements. *Id.* at 1222.

¹⁰ *Metropolitan Life* involved a Massachusetts statute requiring specified minimum mental health care benefits for Massachusetts employees. The Court held that this was a minimal employment standard and not preempted by the NLRA.

Plaintiffs have read the *Bechtel* holding to say that "prevailing wage rates are secondary to collectively-bargained wage rates." Plaintiffs then claim that, since prevailing wage rates are not true minimums, defendants may not force them to pay anything over the NESTU collectively bargained-for apprentice wage rate. According to plaintiffs, because prevailing wage rates are not *Metropolitan Life* legal minimums, they are preempted by the NLRA. *Bechtel*, however, does not address "prevailing wage rates."

More important, the "true legal minimum" at issue in the present case is not the NESTU apprentice wage standard, but apprentice *qualification* standards; i.e., whether the apprenticeship program includes appropriate levels of education, training, and supervision.¹¹ The State simply seeks to enforce its requirement that public works contractors employing apprentices employ only state-approved apprentices. Ordained/approved apprentices are those who participate in state approved programs, i.e., programs that guarantee training in exchange for lower wages. DAS does *not* claim that the NESTU wage scale is too low, or that anyone who was in the legal category of apprentice be paid a higher proportion of pay in relation to the journeymen as was the case in *Bechtel*. Rather, DAS asserts that because plaintiffs do not employ "apprentices," they must pay prevailing wages. If Sound Systems had properly hired apprentices from a program

¹¹ Contrast *Associated Builders and Contractors v. Baca*, 769 F. Supp. 1537, in which certain localities offered a choice between paying certain per diem wages and posting a completion bond, thereby undercutting the stated objective of public safety.

approved by the state, in a craft recognized as "apprenticeable" under prevailing wage law, it could have paid them according to any legal collective bargaining agreement in effect.

Wage rates are at issue only because the State requires plaintiffs to pay journeymen's prevailing wage rates to non-indentured apprentices. Plaintiffs have to pay prevailing wages because that is what they contracted to do, as they have conceded.¹²

The issue before this Court is the State's authority to require apprenticeship program approval, not the State's authority to preempt the collective bargaining process when it comes time to adjust apprentices' wage standards – the claimed authority which was struck down in *Bechtel*.

In the second part of *Bechtel*, the court observed that the *Garmon* rule prohibits the state from regulating any activity that the NLRA protects, prohibits or arguably protects or prohibits, and held that section 7 of the NLRA "preempt[s] any attempt to enforce the Approved Standards against collectively bargained-for wage rates." 812 F.2d at 1225. The court rejected the JAC's argument that the wage standards established a minimum employment standard within the meaning of *Metropolitan Life*, finding that they were not true minimums because they could be undercut through negotiations approved by the DAS. "A

¹² As previously noted, "Sound Systems requested a determination by the County of Sonoma regarding the appropriate prevailing rates applicable to all work performed on the Detention Facility project." After receiving the figures, Sound Systems claims to have paid its employees on the Project at or above the prevailing wage levels quoted by the County.

'minimum' by definition cannot be undercut. *Metropolitan Life* concerned state legislation establishing true minimum labor standards as an exercise of the state's police power." *Bechtel*, 812 F.2d at 1225-26.

The plaintiffs here argue that, under *Bechtel*, the State's prevailing wage law does not establish true minimums because, the approval of an apprenticeship program authorizes lower wage levels. This argument misses the mark, because the minimums at issue here relate to appropriate education and training in apprenticeship programs. Nothing in California's statutory scheme indicates that those standards may be undercut:

Nothing in this chapter or in any apprentice agreement approved under this chapter shall operate to invalidate any apprenticeship provision in any collective agreement between employers and employees setting up *higher* apprenticeship standards.

Cal. Labor Code § 3086 (emphasis added).

The California Apprenticeship Council shall issue rules and regulations which establish standards for minimum wages, maximum hours, and working conditions for apprentice agreements, . . . referred to as apprenticeship standards, which *in no case shall be lower* than those prescribed by this chapter. . . .

Cal. Lab. Code § 3071 (emphasis added). California's apprenticeship standards requiring education and training are true minimums that may not be undercut; therefore, they are true minimum employment standards not preempted by the NLRA.

Minimum employment standards have virtually no effect on the collective bargaining process, and only an indirect effect on the right of self-organization established in section 7 of the NLRA. *Metropolitan Life*, 471 U.S. at 755.

Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part "designed to give specific minimum protection to *individual* workers and to ensure that *each* employee covered by the Act would receive" the mandated [minimum protection].

Id., quoting *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). Section 7 of the NLRA does not preempt California from establishing or enforcing its minimum apprenticeship standards.

Nor are minimum apprenticeship standards preempted by the *Machinists* principle. *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). Under *Machinists* preemption, the Court must consider whether Congress purposely left open the opportunity for the states to establish minimum apprenticeship standards by not legislating in that area. See *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519 (1979). Where the preemptive effect of federal enactments is not explicit,

courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985), quoting *Malone v. White Motor*, 435 U.S. 497, 504 (1978).

Congress has not attempted to occupy the field of apprenticeship standards. The Fitzgerald Act expressly contemplates states creating their own standards. *Siuslaw Concrete Constr. Co. v. Washington Dep't of Transp.*, 784 F.2d 952, 955-58 (9th Cir. 1986). See also 42 U.S.C. § 12576 (State apprenticeship programs and the National and Community Service Act); 20 U.S.C. § 2331, 2382 and 2471 (State apprenticeship programs and vocational education); 23 U.S.C. § 140(a) (State apprenticeship programs and federal highways); 38 U.S.C. § 1787(a)(1) (State apprenticeship programs and veterans). The Court therefore concludes that *Machinists* preemption does not apply.

Plaintiffs have also asserted a civil rights claim pursuant to 42 U.S.C. section 1983. At the hearing on December 12, 1990, the Court granted plaintiffs' motion to amend the complaint to attempt to state a cognizable section 1983 claim.

Plaintiffs base their claim on alleged infringement of their right to collectively bargain under the NLRA. The section 1983 argument, however, is contingent upon defendants' being preempted by the NLRA from enforcing the State's minimum apprenticeship standards. The Court finds no violation of plaintiffs' rights under the NLRA; therefore, the section 1983 claim fails.

CONCLUSION

The State has the right to establish and enforce its own minimum apprenticeship standards. That right is not

preempted by either ERISA or the NLRA. One of the mechanisms for enforcing the standards is to require that apprenticeship programs receive approval from the state before apprentices may be hired on public works projects. Only then can the workers truly be classified as apprentices. Once classified as apprentices, the State permits employers to pay them lower than prevailing wage rates, assured that, in exchange for lower wages, the apprentices are receiving appropriate training and education. Plaintiffs did not hire from an approved apprenticeship program during the period at issue here; therefore, the State did not have those assurances and properly found a violation of section 1771.

The state approval requirement is essential to the State's effective enforcement of its prevailing wage law. The power to establish and enforce minimum employment standards falls squarely within the State's legitimate exercise of its police power. If the State were not able to require that apprenticeship programs be approved before employers may pay workers less than prevailing wages, then the apprenticeship system would become a wide-open loophole through which employers could hire and underpay workers on state public works contracts without offering them the legitimate benefits of apprenticeship status. It is inconceivable that either ERISA or the NLRA could be logically intended or construed to dictate this result.

For all the reasons stated herein, plaintiffs' motion for summary judgment is DENIED. Defendants' motions for summary judgment are GRANTED. The Court need

not reach defendant County of Sonoma's motion to dismiss.

SO ORDERED.

DATED: Dec. 11, 1991

/s/ Fern M. Smith
FERN M. SMITH
 United States District Judge

UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT

DILLINGHAM CONSTRUCTION	)	No. 92-15247
N.A., INC., a California)	
Corporation; MANUEL J. ARCEO,	)	D.C. No.
dba SOUND SYSTEMS MEDIA,	)	CV-90-01272-FMS
Plaintiffs-Appellants,	)	ORDER
)	
v.	)	(Filed
COUNTY OF SONOMA;	)	Jul. 19, 1995)
DIVISION OF LABOR)	
STANDARDS ENFORCEMENT;)	
DEPARTMENT OF INDUSTRIAL)	
RELATIONS, DIVISION OF)	
APPRENTICESHIP STANDARDS,)	
et al.,)	
Defendants-Appellees.)	

BEFORE: CANBY and BRUNETTI, Circuit Judges, and
 JONES,** District Judge

The panel has voted to deny the petition for rehearing.

Circuit Judges Canby and Brunetti have voted to reject the suggestion for rehearing en banc. District Judge Jones has voted to recommend the rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has

**Honorable Robert E. Jones, United States District Judge for the District of Oregon, sitting by designation.

requested a vote on the suggestion for rehearing en banc.
Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

29 U.S.C. § 50 (1994)

§ 50. Promotion of labor standards of apprenticeship

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Secretary of Education in accordance with section 17 of Title 20. For the purpose of this chapter the term "State" shall include the District of Columbia.

29 U.S.C. § 1144(a) (1994)

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(d)(1994)

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

Cal. Lab. Code § 1777.5 (WEST 1995)

§ 1777.5. Apprentices - Employment upon Public Works

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint

apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee which shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman, or in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section shall not apply to contracts of

general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars (\$30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week, shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

- (a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.
- (b) The number of apprentices in training in such area exceeds a ratio of 1 to 5.
- (c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis, or on a local basis.
- (d) Assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to

be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

§ 29.1 Purpose and scope.

(a) The National Apprenticeship Act of 1937, section 1 (29 U.S.C. 50), authorizes and directs the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare * * * ." Section 2 of the Act authorizes the Secretary of Labor to "publish information relating to existing and proposed labor standards of apprenticeship," and to "appoint national advisory committees * * * ." (29 U.S.C. 50a).

(b) The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, or acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, policies and procedures cover the registration, cancellation and deregistration or apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matters relating thereto.

(c) For further information about this Part 29, contact: Deputy Administrator, Bureau of Apprenticeship and Training, Employment and Training Administration, Room 5000, Patrick Henry Building, Washington, D.C. 20213, Telephone number (202) 376-6585.

§ 29.2 Definitions.

As used in this [sic] part:

(a) "Department" shall mean the U.S. Department of Labor.

(b) "Secretary" shall mean the Secretary of Labor or any person specifically designated by him.

(c) "Bureau" shall mean the Bureau of Apprenticeship and Training, Employment and Training Administration.

(d) "Administrator" shall mean the Administrator of the Bureau of Apprenticeship and Training, or any person specifically designated by him.

(e) "Apprentice" shall mean a worker at least 16 years of age, except where a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade as defined in § 29.4 under standards of apprenticeship fulfilling the requirements of § 29.5.

(f) "Apprenticeship program" shall mean a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, including such matters as the requirement for a written apprenticeship agreement.

(g) "Sponsor" shall mean any person, association, committee, or organization operating an apprenticeship program and in whose name the program is (or is to be) registered or approved.

(h) "Employer" shall mean any person or organization employing an apprentice whether or not such person or organization is a party to an apprenticeship agreement with the apprentice.

(i) "Apprenticeship committee" shall mean those persons designated by the sponsor to act for it in the administration of the program. A committee may be "joint," i.e., it is composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s) and has been established to conduct, operate, or administer an apprenticeship program and enter into apprenticeship agreements with apprentices. A committee may be "unilateral" or "non-joint" and shall mean a program sponsor in which a bona fide collective bargaining agent is not a participant.

(j) "Apprenticeship agreement" shall mean a written agreement between an apprentice and either his employer, or an apprenticeship committee acting as agent for employer(s), which agreement contains the terms and conditions of the employment and training of the apprentice.

(k) "Federal purposes" includes any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship.

(l) "Registration of an apprenticeship program" shall mean the acceptance and recording of such program by the Bureau of Apprenticeship and Training, or registration and/or approval by a recognized State Apprenticeship Agency, as meeting the basic standards and requirements of the Department for approval of such program for Federal purposes. Approval is evidenced by a Certificate of Registration or other written indicia.

(m) "Registration of an apprenticeship agreement" shall mean the acceptance and recording thereof by the Bureau or a recognized State Apprenticeship Agency as evidence of the participation of the apprentice in a particular registered apprenticeship program.

(n) "Certification" shall mean written approval by the Bureau of:

(1) A set of apprenticeship standards developed by a national committee or organization, joint or unilateral, for policy or guideline use by local affiliates, as substantially conforming to the standards of apprenticeship set forth in § 29.5; or

(2) An individual as eligible for probationary employment as an apprentice under a registered apprenticeship program.

(o) "Recognized State Apprenticeship Agency" or "recognized State Apprenticeship Council" shall mean an organization approved by the Bureau as an agency or council which has been properly constituted under an acceptable law or Executive order, and has been approved by the Bureau as the appropriate body for State

registration and/or approval of local apprenticeship programs and agreements for Federal purposes.

(p) "State" shall mean any of the 50 States of the United States, the District of Columbia, or any territory or possession of the United States.

(q) "Related instruction" shall mean an organized and systematic form of instruction designed to provide the apprenticeship with knowledge of the theoretical and technical subjects related to his/her trade.

(r) "Cancellation" shall mean the termination of the registration or approval status of a program at the request of the sponsor or termination of an apprenticeship agreement at the request of the apprentice.

(s) "Registration agency" shall mean the Bureau or a recognized State Apprenticeship Agency.

§ 29.3 Eligibility and procedure for Bureau registration of a program.

(a) Eligibility for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State Apprenticeship Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration.

(b) No apprenticeship program or agreement shall be eligible for Bureau registration unless (1) it is in conformity with the requirements of this part and the training is in an apprenticeable occupation having the characteristics set forth in § 29.4 herein, and (2) it is in conformity with the requirements of the Department's regulation on "Equal Employment Opportunity in Apprenticeship and Training" set forth in 29 CFR Part 30, as amended.

(c) Except as provided under paragraph (d) of this section, apprentices must be individually registered under a registered program. Such registration may be effected:

(1) By filing copies of each apprenticeship agreement; or

(2) Subject to prior Bureau approval, by filing a master copy of such agreement followed by a listing of the name, and other required data, of each individual when apprenticed.

(d) The names of persons in their first 90 days of probationary employment as an apprentice under an apprenticeship program registered by the Bureau or a recognized State Apprenticeship Agency, if not individually registered under such program, shall be submitted immediately after employment to the Bureau or State Apprenticeship Agency for certification to establish the apprentice as eligible for such probationary employment.

(e) The appropriate registration office must be promptly notified of the cancellation, suspension, or

termination of any apprenticeship agreement, with cause for same, and of apprenticeship completions.

(f) Operating apprenticeship programs when approved by the Bureau shall be accorded registration evidenced by a Certificate of Registration. Programs approved by recognized State Apprenticeship Agencies shall be accorded registration and/or approval evidenced by a similar certificate or other written indicia. When approved by the Bureau, national apprenticeship standards for policy or guideline use shall be accorded certification, evidenced by a certificate attesting to the Bureau's approval.

(g) Any modification(s) or change(s) to registered or certified programs shall be promptly submitted to the registration office and, if approved, shall be recorded and acknowledged as an amendment to such program.

(h) Under a program proposed for registration by an employer or employers' association, where the standards, collective bargaining agreement or other instrument, provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or "no objection" to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The registration agency shall provide a reasonable time period of not less than 30 days nor more than 60

days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(i) Where the employees to be trained have no collective bargaining agent, an apprenticeship program may be proposed for registration by an employer or group of employers.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10139, Feb. 18, 1977; 42 FR 30836, June 17, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.4 Criteria for apprenticeable occupations.

An apprenticeable occupation is a skilled trade which possesses all of the following characteristics:

(a) It is customarily learned in a practical way through a structured, systematic program of on-the-job supervised training.

(b) It is clearly identified and commonly recognized throughout an industry.

(c) It involves manual, mechanical or technical skills and knowledge which require a minimum of 2,000 hours of on-the-job work experience.

(d) It requires related instruction to supplement the on-the-job training.

§ 29.5 Standards of apprenticeship.

An apprenticeship program, to be eligible for registration/approval by a registration/approval agency, shall conform to the following standards:

(a) The program is an organized, written plan embodying the terms and conditions of employment, training, and supervision of one or more apprentices in the apprenticeable occupation, as defined in this part, and subscribed to by a sponsor who has undertaken to carry out the apprentice training program.

(b) The program standards contain the equal opportunity pledge prescribed in 29 CFR 30.3(b) and, when applicable, an affirmative action plan in accordance with 29 CFR 30.4, a selection method authorized in 29 CFR 30.5, or similar requirements expressed in a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR Part 30 and approved by the Department, and provisions concerning the following:

(1) The employment and training of the apprentice in a skilled trade;

(2) A term of apprenticeship, not less than 2,000 hours of work experience, consistent with training requirements as established by industry practice;

(3) An outline of the work processes in which the apprentice will receive supervised work experience and training on the job, and the allocation of the approximate time to be spent in each major process;

(4) Provision for organized, related and supplemental instruction in technical subjects related to the trade. A minimum of 144 hours for each year of apprenticeship is

recommended. Such instruction may be given in a classroom through trade or industrial courses, or by correspondence courses of equivalent value, or other forms of self-study approved by the registration/approval agency.

(5) A progressively increasing schedule of wages to be paid the apprentice consistent with the skill acquired. The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement;

(6) Periodic review and evaluation of the apprentice's progress in job performance and related instruction; and the maintenance of appropriate progress records;

(7) The numeric ratio of apprentices to journeymen consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language shall be specific and clear as to application in terms of jobsite, work force, department or plant;

(8) A probationary period reasonable in relation to the full apprenticeship term, with full credit given for such period toward completion of apprenticeship;

(9) Adequate and safe equipment and facilities for training and supervision, and safety training for apprentices on the job and in related instruction;

(10) The minimum qualifications required by a sponsor for persons entering the apprenticeship program, with an eligible starting age not less than 16 years;

(11) The placement of an apprentice under a written apprenticeship agreement as required by the State apprenticeship law and regulation, or the Bureau where no such State law or regulation exists. The agreement shall directly, or by reference, incorporate the standards of the program as part of the agreement;

(12) The granting of advanced standing or credit for previously acquired experience, training, or skills for all applicants equally, with commensurate wages for any progression step so granted;

(13) Transfer of employer's training obligation when the employer is unable to fulfill his obligation under the apprenticeship agreement to another employer under the same program with consent of the apprentice and apprenticeship committee or program sponsor;

(14) Assurance of qualified training personnel and adequate supervision on the job;

(15) Recognition for successful completion of apprenticeship evidenced by an appropriate certificate;

(16) Identification of the registration agency;

(17) Provision for the registration, cancellation and deregistration of the program; and requirement for the prompt submission of any modification or amendment thereto;

(18) Provision for registration of apprenticeship agreements, modifications, and amendments; notice to

the registration office of persons who have successfully completed apprenticeship programs; and notice of cancellations, suspensions and terminations of apprenticeship agreements and causes therefor;

(19) Authority for the termination of an apprenticeship agreement during the probationary period by either party without stated cause;

(20) A statement that the program will be conducted, operated and administered in conformity with applicable provisions of 29 CFR Part 30, as amended, or a State EEO in apprenticeship plan adopted pursuant to 29 CFR Part 30 and approved by the Department;

(21) Name and address of the appropriate authority under the program to receive, process and make disposition of complaints;

(22) Recording and maintenance of all records concerning apprenticeship as may be required by the Bureau or recognized State Apprenticeship Agency and other applicable law.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10139, Feb. 18, 1977; 42 FR 30836, June 17, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.6 Apprenticeship agreement.

The apprenticeship agreement shall contain explicitly or by reference:

(a) Names and signatures of the contracting parties (apprentice, and the program sponsor or employer), and

the signature of a parent or guardian if the apprentice is a minor.

(b) The date of birth of apprentice.

(c) Name and address of the program sponsor and registration agency.

(d) A statement of the trade or craft in which the apprentice is to be trained, and the beginning date and term (duration) of apprenticeship.

(e) A statement showing (1) the number of hours to be spent by the apprentice in work on the job, and (2) the number of hours to be spent in related and supplemental instruction which is recommended to be not less than 144 hours per year.

(f) A statement setting forth a schedule of the work processes in the trade or industry divisions in which the apprentice is to be trained and the approximate time to be spent at each process.

(g) A statement of the graduated scale of wages to be paid the apprentice and whether or not the required school time shall be compensated.

(h) Statements providing:

(1) For a specific period of probation during which the apprenticeship agreement may be terminated by either party to the agreement upon written notice to the registration agency;

(2) That, after the probationary period, the agreement may be cancelled at the request of the apprentice, or may be suspended, cancelled, or terminated by the sponsor, for good cause, with due notice to the apprentice and

a reasonable opportunity for corrective action, and with written notice to the apprentice and to the registration agency of the final action taken.

(i) A reference incorporating as part of the agreement the standards of the apprenticeship program as it exists on the date of the agreement and as it may be amended during the period of the agreement.

(j) A statement that the apprentice will be accorded equal opportunity in all phases of apprenticeship employment and training, without discrimination because of race, color, religion, national origin, or sex.

(k) Name and address of the appropriate authority, if any, designated under the program to receive, process and make disposition of controversies or differences arising out of the apprenticeship agreement when the controversies or differences cannot be adjusted locally or resolved in accordance with the established trade procedure or applicable collective bargaining provisions.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10139 Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.7 Deregistration of Bureau-registered program.

Deregistration of a program may be effected upon the voluntary action of the sponsor by a request for cancellation of the registration, or upon reasonable cause, by the Bureau instituting formal deregistration proceedings in accordance with the provisions of this part.

(a) *Request by sponsor.* The registration officer may cancel the registration of an apprenticeship program by written acknowledgment of such request stating, but not limited to, the following matters:

(1) The registration is canceled at sponsor's request, and effective date thereof;

(2) That, within 15 days of the date of the acknowledgment, the sponsor shall notify all apprentices of such cancellation and the effective date; that such cancellation automatically deprives the apprentice of his/her individual registration; and that the deregistration of the program removes the apprentice from coverage for Federal purposes which require the Secretary of Labor's approval of an apprenticeship program.

(b) *Formal deregistration - (1) Reasonable cause.* Deregistration proceedings may be undertaken when the apprenticeship program is not conducted, operated, and administered in accordance with the registered provisions or the requirements of this part, except that deregistration proceedings for violation of equal opportunity requirements shall be processed in accordance with the provisions under 29 CFR Part 30, as amended;

(2) Where it appears the program is not being operated in accordance with the registered standards or with requirements of this part, the registration officer shall so notify the program sponsor in writing;

(3) The notice shall (i) be sent by registered or certified mail, with return receipt requested; (ii) state the shortcoming(s) and the remedy required; and

(iii) state that a determination of reasonable cause for deregistration will be made unless corrective action is effected within 30 days;

(4) Upon request by the sponsor for good cause, the 30-day term may be extended for another 30 days. During the period for correction, the sponsor shall be assisted in every reasonable way to achieve conformity;

(5) If the required correction is not effected within the allotted time, the registration officer shall send a notice to the sponsor, by registered or certified mail, return receipt requested, stating the following:

(i) The notice is sent pursuant to this subsection;

(ii) Certain deficiencies (stating them) were called to sponsor's attention and remedial measures requested, with dates of such occasions and letters; and that the sponsor has failed or refused to effect correction;

(iii) Based upon the stated deficiencies and failure of remedy, a determination of reasonable cause has been made and the program may be deregistered unless, within 15 days of the receipt of this notice, the sponsor requests a hearing;

(iv) If a request for a hearing is not made, the entire matter will be submitted to the Administrator, BAT, for a decision on the record with respect to deregistration.

(6) If the sponsor has not requested a hearing, the registration officer shall transmit to the Administrator, BAT, a report containing all pertinent facts and circumstances concerning the nonconformity, including the findings and recommendation for deregistration, and copies

of all relevant documents and records. Statements concerning interviews, meetings and conferences shall include the time, date, place, and persons present. The Administrator shall make a final order on the basis of the record before him.

(7) If the sponsor requests a hearing, the registration officer shall transmit to the Secretary, through the Administrator, a report containing all the data listed in paragraph (b)(6) of this section. The Secretary shall convene a hearing in accordance with § 29.9; and shall make a final decision on the basis of the record before him including the proposed findings and recommended decision of the hearing officer.

(8) At his discretion, the Secretary may allow the sponsor a reasonable time to achieve voluntary corrective action. If the Secretary's decision is that the apprenticeship program is not operating in accordance with the registered provisions or requirements of this part, the apprenticeship program shall be deregistered. In each case in which reregistration is ordered, the Secretary shall make public notice of the order and shall notify the sponsor.

(9) Every order of deregistration shall contain a provision that the sponsor shall, within 15 days of the effective date of the order, notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice or his/her individual registration; and that the deregistration removes the apprentice from coverage for Federal purposes which require the Secretary of Labor's approval of an apprenticeship program.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10319, Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.8 Reinstatement of program registration.

Any apprenticeship program deregistered pursuant to this part may be reinstated upon presentation of adequate evidence that the apprenticeship program is operating in accordance with this part. Such evidence shall be presented to the Administrator, BAT, if the sponsor had not requested a hearing, or to the Secretary, if an order of deregistration was entered pursuant to a hearing.

§ 29.9 Hearings.

(a) Within 10 days of his receipt of a request for a hearing, the Secretary shall designate a hearing officer. The hearing officer shall give reasonable notice of such hearing by registered mail, return receipt requested, to the appropriate sponsor. Such notice shall include (1) a reasonable time and place of hearing, (2) a statement of the provisions of this part pursuant to which the hearing is to be held, and (3) a concise statement of the matters pursuant to which the action forming the basis of the hearing is proposed to be taken.

(b) The hearing officer shall regulate the course of the hearing. Hearings shall be informally conducted. Every party shall have the right to counsel, and a fair opportunity to present his/her case, including such cross-examination as may be appropriate in the circumstances.

Hearings officers shall make their proposed findings and recommended decisions to the Secretary upon the basis of the record before them.

§ 29.10 Limitations.

Nothing in this part or in any apprenticeship agreement shall operate to invalidate.

(a) Any apprenticeship provision in any collective bargaining agreement between employers and employees establishing higher apprenticeship standards; or

(b) Any special provision for veterans, minority persons or females in the standards, apprentice qualifications or operation of the program, or in the apprenticeship agreement, which is not otherwise prohibited by law, Executive order, or authorized regulation.

§ 29.11 Complaints.

(a) This section is not applicable to any complaint concerning discrimination or other equal opportunity matters; all such complaints shall be submitted, processed and resolved in accordance with applicable provisions in 29 CFR Part 30, as amended, or applicable provisions of a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR Part 30 and approved by the Department.

(b) Except for matters described in paragraph (a) of this section, any controversy or difference arising under an apprenticeship agreement which cannot be adjusted locally and which is not covered by a collective bargaining agreement, may be submitted by an apprentice, or

his/her authorized representative, to the appropriate registration authority, either Federal or State, which has registered and/or approved the program in which the apprentice is enrolled, for review. Matters covered by a collective bargaining agreement are not subject to such review.

(c) The complaint, in writing and signed by the complainant, or authorized representative, shall be submitted within 60 days of the final local decision. It shall set forth the specific matter(s) complained of, together with all relevant facts and circumstances. Copies of all pertinent documents and correspondence shall accompany the complaint.

(d) The Bureau or recognized State Apprenticeship Agency, as appropriate, shall render an opinion within 90 days after receipt of the complaint, based upon such investigation of the matters submitted as may be found necessary, and the record before it. During the 90-day period, the Bureau or State agency shall make reasonable efforts to effect a satisfactory resolution between the parties involved. If so resolved, the parties shall be notified that the case is closed. Where an opinion is rendered, copies of same shall be sent to all interested parties.

(e) Nothing in this section shall be construed to require an apprentice to use the review procedure set forth in this section.

(f) A State Apprenticeship Agency may adopt a complaint review procedure differing in detail from that given in this section provided it is proposed and has been approved in the recognition of the State Apprenticeship Agency accorded by the Bureau.

§ 29.12 Recognition of State agencies.

(a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:

- (1) An acceptable State apprenticeship law (or Executive order), and regulations adopted pursuant thereto;
- (2) Acceptable composition of the State Apprenticeship Council (SAC);
- (3) An acceptable State Plan for Equal Employment Opportunity in Apprenticeship;
- (4) A description of the basic standards, criteria, and requirements for program registration and/or approval; and
- (5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

(b) *Basic requirements.* Generally the basic requirements under the matters covered in paragraph (a) of this section shall be in conformity with applicable requirements as set forth in this part. Acceptable State provisions shall:

- (1) Establish the apprenticeship agency in (i) the State Department of Labor, or (ii) in that agency of State government having jurisdiction of laws and regulations

governing wages, hours, and working conditions, or (iii) that State agency presently recognized by the Bureau, with a State official empowered to direct the apprenticeship operation;

(2) Require that the State Apprenticeship Council be composed of persons familiar with apprenticeable occupations and an equal number of representatives of employer and of employee organizations and may include public members who shall not number in excess of the number named to represent either employer or employee organizations. Each representative so named shall have one vote. Ex officio members may be added to the council but they shall have no vote except where such members have a vote according to the established practice of a presently recognized council. If the State official who directs the apprenticeship operation is a member of the council, provision may be made for the official to have a tie-breaking vote;

(3) Clearly delineate the respective powers and duties of the State official and of the council;

(4) Clearly designate the officer or body authorized to register and deregister apprenticeship programs and agreements;

(5) Establish policies and procedures to promote equality of opportunity in apprenticeship programs pursuant to a State Plan for Equal Employment Opportunity in Apprenticeship which adopts and implements the requirements of 29 CFR Part 30, as amended, and to require apprenticeship programs to operate in conformity with such State Plan and 29 CFR Part 30, as amended;

(6) Prescribe the contents of apprenticeship agreements;

(7) Limit the registration of apprenticeship programs to those providing training in "apprenticeable" occupations as defined in § 29.4;

(8) Provide that apprenticeship programs and standards of employers and unions in other than the building and construction industry, which jointly form a sponsoring entity on a multistate basis and are registered pursuant to all requirements of this part by any recognized State Apprenticeship Agency/Council or by the Bureau, shall be accorded registration or approval reciprocity by any other State Apprenticeship Agency/Council or office of the Bureau if such reciprocity is requested by the sponsoring entity;

(9) Provide for the cancellation, deregistration and/or termination of approval of programs, and for temporary suspension, cancellation, deregistration and/or termination of approval of apprenticeship agreements; and

(10) Provide that under a program proposed for registration by an employer or employers' association, and where the standards, collective bargaining agreement or other instrument provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgment of union agreement or "no objection" to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of its

application for registration and of the apprenticeship program. The State agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(c) *Application for recognition.* A State Apprenticeship Agency/Council desiring recognition shall submit to the Administrator, BAT, the documentation specified in § 29.12(a) of this part. A currently recognized Agency/Council desiring continued recognition by the Bureau shall submit to the Administrator the documentation specified in § 29.12(a) of this part on or before July 18, 1977. An extension of time within which to comply with the requirements of this part may be granted by the Administrator for good cause upon written request by the State agency but the Administrator shall not extend the time for submission of the documentation required by § 29.12(a). The recognition of currently recognized Agencies/Councils shall continue until July 18, 1977 and during any extension period granted by the Administrator.

(d) *Appeal from denial of recognition.* The denial by the Administrator of a State agency's application for recognition under this part shall be in writing and shall set forth the reasons for the denial. The notice of denial shall be sent to the applicant by certified mail, return receipt requested. The applicant may appeal such a denial to the Secretary by mailing or otherwise furnishing to the Administrator, within 30 days of receipt of the denial, a notice of appeal addressed to the Secretary and setting forth the following items:

(1) A statement that the applicant appeals to the Secretary to reverse the Administrator's decision to deny its application;

(2) The date of the Administrator's decision and the date the applicant received the decision;

(3) A summary of the reasons why the applicant believes that the Administrator's decision was incorrect;

(4) A copy of the application for recognition and subsequent modifications, if any;

(5) A copy of the Administrator's decision of denial. Within 10 days of receipt of a notice of appeal, the Secretary shall assign an Administrative Law Judge to conduct hearings and to recommend findings of fact and conclusions of law. The proceedings shall be informal, witnesses shall be sworn, and the parties shall have the right to counsel and of cross-examination.

The Administrative Law Judge shall submit the recommendations and conclusions, together with the entire record to the Secretary for final decision. The Secretary shall make his final decision in writing within 30 days of the Administrative Law Judge's submission. The Secretary may make a decision granting recognition conditional upon the performance of one or more actions by the applicant. In the event of such a conditional decision, recognition shall not be effective until the applicant has submitted to the Secretary evidence that the required actions have been performed and the Secretary has communicated to the applicant in writing that he is satisfied with the evidence submitted.

(e) *State apprenticeship programs.*

(1) An apprenticeship program submitted for registration with a State Apprenticeship Agency recognized by the Bureau shall, for Federal purposes, be in conformity with the State apprenticeship law, regulations, and with the State Plan for Equal Employment Opportunity in Apprenticeship as submitted to and approved by the Bureau pursuant to 29 CFR 30.15, as amended;

(2) In the event that a State Apprenticeship Agency is not recognized by the Bureau for Federal purposes, or that such recognition has been withdrawn, or if no State Apprenticeship Agency exists, registration with the Bureau may be requested. Such registration shall be granted if the program is conducted, administered and operated in accordance with the requirements of this part and the equal opportunity regulation in 29 CFR Part 30, as amended.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10318, Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.13 Derecognition of State agencies.

The recognition for Federal purposes of a State Apprenticeship Agency or State Apprenticeship Council (hereinafter designated "respondent"), may be withdrawn for the failure to fulfill, or operate in conformity with, the requirements of this part. Derecognition proceedings for reasonable cause shall be instituted in accordance with the following:

(a) Derecognition proceedings for failure to adopt or properly enforce a State Plan for Equal Employment Opportunity in Apprenticeship shall be processed in accordance with the procedures prescribed in 29 CFR 30.15.

(b) For causes other than those under paragraph (a) above, the Bureau shall notify the respondent and appropriate State sponsors in writing, by certified mail, with return receipt requested. The notice shall set forth the following:

(1) That reasonable cause exists to believe that the respondent has failed to fulfill or operate in conformity with the requirements of this part;

(2) The specific areas of nonconformity;

(3) The needed remedial measures; and

(4) That the Bureau proposes to withdraw recognition for Federal purposes unless corrective action is taken, or a hearing request mailed, within 30 days of the receipt of the notice.

(c) If, within the 30-day period, respondent:

(1) Complies with the requirements, the Bureau shall so notify the respondent and State sponsors, and the case shall be closed;

(2) Fails to comply or to request a hearing, the Bureau shall decide whether recognition should be withdrawn. If the decision is in the affirmative, the Administrator shall forward all pertinent data to the Secretary,

together with the findings and recommendation. The Secretary shall make the final decision, based upon the record before him.

(3) Requests a hearing, the Administrator shall forward the request to the Secretary, and the procedures under § 29.9 shall be followed, with notice thereof to the State apprenticeship sponsors.

(d) If the Secretary determines to withdraw recognition for Federal purposes, he shall notify the respondent and the State sponsors of such withdrawal and effect public notice of such withdrawal. The notice to the sponsors shall state that, 30 days after the date of the Secretary's order withdrawing recognition of the State agency, the Department shall cease to recognize, for Federal purposes, each apprenticeship program registered with the State agency unless, within that time, the State sponsor requests registration with the Bureau. The Bureau may grant the request for registration contingent upon its finding that the State apprenticeship program is operating in accordance with the requirements of this part and of 29 CFR Part 30, as amended. The Bureau shall make a finding on this issue within 30 days of receipt of the request. If the finding is in the negative, the State sponsor shall be notified in writing that the contingent Bureau registration has been revoked. If the finding is in the affirmative, the State sponsor shall be notified in writing that the contingent Bureau registration is made permanent.

(e) If the sponsor fails to request Bureau registration, or upon a finding of noncompliance pursuant to a contingent Bureau registration, the written notice to such

State sponsor shall further advise the recipient that any actions or benefits applicable to recognition "for Federal purposes" are no longer available to participants in its apprenticeship program.

(f) Such notice shall also direct the State sponsor to notify, within 15 days, all its registered apprentices of the withdrawal of recognition for Federal purposes; the effective date thereof; and that such withdrawal removes the apprentice from coverage under any Federal provision applicable to his/her individual registration under a program recognized or registered by the Secretary of Labor for Federal purposes.

(g) A State Apprenticeship Agency or Council whose recognition has been withdrawn pursuant to this part may have its recognition reinstated upon presentation of adequate evidence that it has fulfilled, and is operating in accordance with, the requirements of this part.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10139, Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

38 Fed. Reg. 13894 (1973) (to be codified at 29 C.F.R. pt. 29) (proposed May 25, 1973)

DEPARTMENT OF LABOR

Office of the Secretary

[29 CFR Part 29]

**LABOR STANDARDS FOR THE REGISTRATION
OF APPRENTICESHIP PROGRAMS**

Notice of Proposed Rulemaking

Pursuant to section 1 of the National Apprenticeship Act of 1937 (29 U.S.C. 50), Reorganization Plan No. 14 of 1950 (64 Stat. 1267; 3 CFR 1949-53 Comp., p. 1007), the Copeland Act (40 U.S.C. 276c), and 5 U.S.C. 301, it is proposed to amend 29 CFR subtitle A by adding thereto a new part 29 to read as set forth below. If this proposed new part 29 is adopted, conforming changes will be made at a later date in part 30 of the title.

This new part sets out labor standards, policies, and procedures relating to the registration, cancellation, and deregistration of apprenticeship programs and of apprenticeship agreements by the Bureau of Apprenticeship and Training, the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes, and the standards for Bureau approval of on-the-job training programs.

Interested persons may submit written data, views, and arguments concerning this proposal to the Secretary of Labor, U.S. Department of Labor, Washington, D.C. 20210, on or before June 25, 1973.

* * *

40 Fed. Reg. 11340 (1975) (to be codified at 29 C.F.R. pt. 29) (proposed Mar. 10, 1975)

DEPARTMENT OF LABOR

Office of the Secretary

[29 CFR Part 29]

APPRENTICESHIP PROGRAMS

Proposed Registration Standards

Pursuant to section 1 of the National Apprenticeship Act of 1937 (29 U.S.C. 50), Reorganization Plan No. 14 of 1950 (64 Stat. 1267; 3 CFR 1949-53 Comp., p. 1007), the Copeland Act (40 U.S.C. 276c), and 5 U.S.C. 301, the Department of Labor proposed to amend 29 CFR subtitle A by adding thereto a new Part 29, which was published at 38 FR 13894.

This proposed new part set out labor standards, policies and procedures relating to the registration cancellation and deregistration of apprenticeship programs and of apprenticeship agreements by the Bureau of Apprenticeship and Training, the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes, and the standards for Bureau approval of on-the-job training programs.

The Department invited interested persons to submit written views and comments concerning the proposal and numerous comments were received. The Department studied these comments carefully with a resulting decision to revise the proposed regulations in certain respects. The intended revisions were presented to the

Federal Committee on Apprenticeship and the Committee after consideration, has recommended their adoption.

The revisions with a short explanatory statement are as follows:

In § 29.1(b) delete the last sentence, which reads: "Standards for Bureau approval of on-the-job training programs are also set forth." This and all other references to "on-the-job training" and to "trainees" at various places throughout the proposal, including § 29.15 in its entirety, are deleted. These revisions are consistent with the principle of confining the proposed apprenticeship regulations in this part to matters of apprenticeship only.

In § 29.4 delete paragraphs (c), (f), (g), and the second sentence of (e); modify paragraph (d) so that the minimum term of apprenticeship is 2,000 hours of work experience and additional hours of related instruction. These revisions are intended to make less restrictive the criteria for apprenticeable occupations and to encourage the expansion of the apprenticeship system into occupational fields where it has not traditionally been used.

In § 29.5(b) paragraph (2) has been modified to conform to § 29.4(d).

In § 29.5(b) delete paragraph (20) as being impractical as a universal requirement, and unnecessary in view of the protections afforded in § 29.6(h) (1) and (2).

In § 29.6 delete paragraph (k), which pertains to the transfer of apprenticeship agreements in certain cases, as being impractical and imposing an unnecessary burden upon the employer in view of § 29.5(b)(13).

Section 29.12 is rewritten to provide in paragraph (b)(1) for continued recognition of State apprenticeship agencies presently recognized, and in paragraph (b)(2) to provide for public members on State apprenticeship councils and to accommodate existing voting practices by such councils. The present § 29.12(c) is redesignated as (d); a new paragraph (c) is inserted; it provides for the right of appeal and procedures related thereto in case of the denial of the application by a State agency for recognition.

Section 29.14 is deleted in entirety as unnecessary for administrative purposes.

Other minor revisions are made for clarity.

Interested persons may submit written views and arguments concerning this revised proposal to the Secretary of Labor, U.S. Department of Labor, Washington, D.C. 20210, on or before April 9, 1975.

* * *

42 Fed. Reg. 10138-10139 (1977) (to be codified at 29 C.F.R. pt. 29)

Title 29 - Labor

SUBTITLE A - OFFICE OF THE SECRETARY OF LABOR

PART 29 - LABOR STANDARDS FOR THE REGISTRATION OF APPRENTICESHIP PROGRAMS

Policies and Procedures

On Tuesday, October 19, 1976, the Department of Labor published in the FEDERAL REGISTER (41 FR 46148) proposed registration standards for apprenticeship programs. These standards, in the form of the addition of a new Part 29 to 29 CFR subtitle A, were promulgated pursuant to the authority of section 1 of the National Apprenticeship Act of 1937 (29 U.S.C. 50) Reorganization Plan No. 14 of 1950 (64 Stat. 1267; 3 CFR 1949-53 Comp., p. 1007), the Copeland Act (40 U.S.C. 276c), and 5 U.S.C. 301.

A revised version of the proposed standards was issued in 1975 and published at 40 FR 11340 (3-10-75). Comments to this initial proposed rulemaking were considered at length by the Federal Committee on Apprenticeship and by the Department of Labor. This process resulted in the insurance of the proposed rulemaking on October 19, 1976. The Department invited interested persons to submit written views and comments before November 22, 1976, concerning the proposal, and numerous responses were received. The Department has studied these comments carefully and several editorial and clarifying changes have been incorporated into the regulation. However, Part 29, which is published as final today is basically the same as the proposal of October 19.

This document was prepared under the direction of Hugh C. Murphy, Administrator, Bureau of Apprenticeship and Training. For Further information about this document, contact:

James P. Mitchell, Deputy Administrator, Bureau of Apprenticeship and Training, Employment and Training Administration, Room 5000, Patrick Henry Building, Washington, D.C. 20213. Telephone No. 202-376-6585.

This new part sets out labor standards, policies and procedures relating to the registration, cancellation and deregistration of apprenticeship programs and of apprenticeship agreements by the Bureau of Apprenticeship and Training (BAT), the recognition of a State Apprenticeship Council or Agency (SAC) as the appropriate agency for registering local apprenticeship programs for certain Federal purposes, and the derecognition of a SAC.

Those provisions which caused significant comment are as follows:

1. In § 29.2, Definitions, the definition of "Federal purposes" in paragraph (k) was unclear to several persons. The definition in this section is very broad. However, those Federal purposes which this part affects are described in § 29.3(a), which reads as follows: "Eligibility for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State Apprenticeship

Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration." Examples of such Federal purposes are the Davis-Bacon Act and the Service Contract Act.

2. In § 29.3, Eligibility and procedure for Bureau registration of a program, some persons read paragraph (h) as being applicable to "unilateral" programs (i.e., to programs sponsored by employers not having a collective bargaining agreement with a union). The text makes it quite clear that paragraph (h) applies only to those potential sponsors who are parties to an existing collective bargaining agreement and then only in very limited circumstances. Paragraph (1) underscores this point; it states that where an employer or group of employers wishes to register an apprenticeship program and there is no existing collective bargaining agreement, the employer or group of employers are not required to deal with a union.

3. In § 29.4. Criteria for apprenticeable occupation, paragraph (c) states that an apprenticeable occupation "involves manual, mechanical or technical skills and knowledge which require a minimum of 2,000 hours of on-the-job work experience." Several persons had the impression that the Bureau of Apprenticeship and Training would allow almost any presently-recognized apprenticeable occupation to be registered as long as it met a minimum standard of 2,000 hours of on-the-job experience. This is not the intent of the Bureau of Apprenticeship and Training, nor does the paragraph when read in connection with the rest of this part - particularly § 29.5.

Standards of apprenticeship – allow such an interpretation. Although the Bureau of Apprenticeship and Training has recognized only a handful of occupations having a minimum requirement of 2,000 hours of on-the-job experience, as well as related instruction to supplement this work experience, the Department believes other such occupations may exist. By setting 2,000 hours of on-the-job work experience as the minimum criterion, the Department feels it will be better able to fulfill its responsibility under the Fitzgerald Act to promote apprenticeship.

4. In § 29.5, Standards of apprenticeship, a number of changes have been made.

Paragraph (b)(4) has been changed to emphasize that plans of self-study will not be automatically approved. Rather, each such proposed plan will be considered on its merits by the Bureau of Apprenticeship and Training, as will [sic] as all other forms of related training, before approval is given to a program.

Paragraph (b)(7) has been amended to include safety as one of the factors to be weighed by the Bureau of Apprenticeship and Training when it considers the proposed ratio of apprentices to journeymen.

Paragraph (b)(10) has been revised as follows (omitted words are in brackets; added words are italicized): "The [required] minimum qualifications *required by a sponsor* for persons entering [an] *the* apprenticeship program, with an eligible starting age not less than 16 years;"

Paragraph (b)(14) has been revised by adding the words in italics: "Assurance of qualified training personnel *and adequate supervision on the job.*"

5. In § 29.12(a). Recognition of State agencies, the language of paragraph (a) has been revised to clarify the legal effect of the Secretary's recognition of a State Apprenticeship Council. Paragraph (a) now reads: "(a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:"

6. In § 29.12, several commenters objected to the language of paragraph (b) (8). This paragraph requires the SAC to "provide that apprenticeship programs and standards of employers and unions in other than the building and construction industry, which jointly form a sponsoring entity on a multistate basis and are registered pursuant to all requirements of this part by any recognized State Apprenticeship Agency/Council or by the Bureau, shall be accorded registration or approval reciprocity by any other State Apprenticeship Agency/Council or office of the Bureau if such reciprocity is requested by the sponsoring entity."

This provision was approved without dissent by the Federal Committee on Apprenticeship on September 8, 1976. It was the intent of the Committee to simplify the problems experienced by a relatively few number of

apprenticeship programs. None of these programs are in the construction occupations. Rather the paragraph applies to those programs which are operated by large, industrial companies such as General Motors, Ford, Alco, etc. in conjunction with the locals of several large international unions.

The national standards for these programs are developed by the national office of the joint apprenticeship committee of the industry, in conjunction with the national staff of the Bureau of Apprenticeship and Training. The Department of Labor approves and publishes these standards. The local joint apprenticeship committee ordinarily adopts the approved national pattern standards without change, except for such local matters as those involving wage rates and affirmative action goals. The local programs, which are administered jointly by the employer and the union, are situated in large plants with a relatively stable work force employed on a year-round basis. Hence, these programs differ from the typical construction employer who operates on a multistate basis.

The construction industry employs a mobile work force primarily in seasonal jobs. In construction programs, because of the seasonality of construction work, the apprentice's on-the-job training will usually be interrupted several times during the course of his/her apprenticeship and the supervision will be provided by several employers. In multistate operations, it may be necessary to provide related instruction at several places.

In the non-construction programs which this paragraph will affect, the typical apprentice will be employed year-round at the same site by the same employer during

the entire term of his/her apprenticeship, and will receive on-the-job training and supervision from the same employer. Although related training may not be conducted at the worksite, it will ordinarily be conducted at the same location throughout the entire term of the individual's apprenticeship.

The Department believes it is reasonable to make a distinction between apprenticeship programs in the construction industry and those in other industries because of the differences mentioned above. These differences have an effect on what factors are necessary to insure a proper apprenticeship program in a particular craft.

The Department believes it is reasonable to draw a distinction between those multistate non-construction employers who conduct an apprenticeship program jointly with a union and those who conduct a unilateral apprenticeship program. The local programs, in practice, adopt the occupation's national pattern standards which have been developed by the occupation's national joint apprenticeship committee in cooperation with the national office of BAT and published by the Department.

The program is administered not by the employer alone but by the local joint apprenticeship committee (JAC) composed of both employer and union representatives. These two elements have both mutual and conflicting interest in assuring that the apprenticeship program is properly operated. The result of this tension of interests is more likely to result in a proper training program than would be the case in a program operated unilaterally.

Because of the stable year-round work force at the worksite, the journeymen are able to reach an informed opinion on the quality of the apprenticeship program. Each of the journeymen pays a percentage of his/her wage for the operation of the program. These circumstances increase the likelihood that complaints about deficiencies in the program. If not corrected by the JAC, will reach the registration agency which can take corrective action.

7. In § 29.12(c), language has been added to make clear that currently-recognized State Apprenticeship Agencies and State Apprenticeship Councils retain their recognition during the 120-day period after the effective date of this part, as well as during any extension period granted by the Administrator.

8. Several persons believed that the requirements contained throughout § 29.12 represent an unwarranted intrusion of Federal control into the operations of the SACs. The Department believes that this conclusion is not correct.

As far as the Department knows, the recognized SACs are already in substantial conformity with the minimum standards set forth in this section, with the exception of paragraphs (b)(8) and (b)(10), which have been addressed earlier. Where they are not, paragraph (c) affords the State a 120-day period within which to conform. An extension of time may be granted by the Administrator of the Bureau for good cause.

It does not seem to the Department that it will be an undue hardship for the SACs to conform to the minimal requirements set forth in this part or to provide to the

Department the information required by § 29.12(a), since recognition by the Secretary has important economic effects (as in the operation of the Davis-Bacon Act and the Service Contract Act) and important effects in promoting and improving the apprenticeship system. For these reasons it seems reasonable to the Department that the Secretary have documentary evidence that a recognized State agency is conforming to the minimum standard set forth in this part.

Some persons have read § 29.12(a)(5) in a manner which does not appear justified by the text. It requires a SAC to submit to the Bureau "a description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part." While the Bureau has the right to approve or disapprove such variations, the purpose of this provision is not to enable the Bureau to control SACs or to dictate policies and procedures. Rather, it allows the Secretary to be informed of the policies and procedures of the SACs to which the Secretary has accorded recognition. The Department can then make its own judgment on whether these policies and procedures conflict with the requirements of this part.

9. Finally, some persons expressed reservations about the hearing procedures that are outlined in these regulations, primarily in § 29.9. Specifically, hearings are called for in the following circumstances:

(a) The deregistration of Bureau-registered program (§ 29.7);

(b) Denials of a State agency's application for Bureau recognition (§ 29.12); and

(c) Withdrawal of Bureau recognition of a State Apprenticeship Agency or Council (§ 29.13). These hearings are available to the aggrieved parties specified in the respective sections, when such aggrieved parties have taken the steps required to trigger their hearing rights.

The Department has adopted the hearing procedures used in this part for a number of reasons. First: The hearing provisions are sound from a standpoint of due process and conform to well-settled principles of administrative law. Section 29.9 allows for the appointment of an administrative law judge. Moreover, the hearing provides a forum where both sides, in an adversary setting, may present and defend evidence.

Second: The hearing provisions in this part are virtually identical to those of 29 CFR Part 30, relating to Equal Opportunity in Apprenticeship. The Department is not aware of any serious complaints about this procedure. It is anticipated that hearings under Part 29 will be infrequent. Under these circumstances, it does not seem feasible to establish a separate appeals mechanism.

* * *

HOUSE COMM. ON LABOR,
SAFEGUARD THE WELFARE OF APPRENTICES, H.R.
Rep. No. 945, 75th Cong., 1st Sess. 2-3 (1937)

PURPOSE OF THE BILL

Before 1934 there had been no national approach toward having labor standings of apprenticeship accepted. The Federal Committee on Apprentice Training has established a workable approach, has brought together national trade associations and labor organizations to formulate apprenticeship programs acceptable to both groups, has cooperated with State and local groups interested in apprenticeship, and has served in an advisory capacity to both employers and employees in setting up practical programs for training skilled workers. The bill (H. R. 6205) permits the continuance of the work which is now being done by the Federal Committee on Apprentice Training and which has proved of great value to industry, labor, and young people. The Federal Committee on Apprentice Training was appointed by the Secretary of Labor in June 1934 under authority granted by Executive Order No. 6750-C, to provide for genuine apprentice training under the National Recovery Administration codes and at the same time safeguard labor standards. So effective was the work of the Federal Committee under the National Recovery Administration that it was decided to continue it after the National Recovery Act was declared unconstitutional. Its administration was placed under the jurisdiction of the National Youth Administration. In September 1936 the President, in a letter to the Secretary of Labor, requested the transfer of the Federal Committee on Apprentice Training to the Department of Labor and directed that an appropriation

to cover this activity be included in the Department's budget. Such action was approved by the National Youth Administration and by the Federal Committee on Apprenticeship Training. It was recognized that the work should be placed on a permanent basis.

Accordingly, the Department of Labor included an item for the work of the Federal Committee in its appropriation request for 1937-38 and the Budget Bureau recommended to the Congress an appropriation for this work during the coming fiscal year. However, the Committee on Appropriations of the House of Representatives was of the opinion that it could not approve this item as a matter of policy and that the assignment of functions should have special consideration by Congress. In accordance with this decision, H. R. 6205 was introduced by Mr. Fitzgerald of Connecticut and referred to the Committee on Labor.

The committee is of the opinion that the development of an adequate apprenticeship system is not an emergency program. There is constant need for some Federal agency to bring employers and employees together in the formulation of national programs of apprenticeship and to attempt to adjust the supply of skilled workers to the demands of industry. This is a logical function of the United States Department of Labor.

The forces which give rise to the prediction of a shortage of skilled workers in some trades were not set in motion by the depression alone. Because of the inadequacy of American apprenticeship, a large part of the supply of skilled labor came from abroad. The setting up of immigration bars dried up this source of supply. The

effect of the immigration laws on the supply of skilled labor, however, was discounted because of the fact that it was erroneously believed the automatic machine was rapidly making the all-around skilled workman unnecessary; and because it was expected that technical schools could provide all the training required for skilled work. Another cause was the failure to emphasize the attractiveness to youth of work in the trades. The depression, it is true, has aggravated the situation by terminating such apprenticeship programs as were being conducted. During the last 5 years there has also been a natural shrinkage in the ranks of skilled workers. The records of the United States Employment Service show that a skilled labor shortage is evidenced when a trade reaches 75 to 80 percent of normal. So, with increasing business activity, this problem of shortage of craftsmen will become more acute.

The important bearing that the training of skilled workers has upon our social structure, especially with respect to relief, security, citizenship, crime, and national defense, was clearly indicated to the committee. Because of the nature of the problem, it is of vital importance that the Congress take cognizance of it and take action to strengthen the remedial measures which have been inaugurated by the Federal Committee on Apprenticeship Training.

Both employers and labor heartily approved the work which is being done by the Federal Committee on Apprenticeship Training and recommended that it be continued under the Department of Labor. The agency dealing with labor standards in apprenticeship must have the confidence of labor and of employers, for their whole-

hearted support and cooperation must be secured before constructive action can be started. The employer supplies the job and the facilities for training. The workers have the skill and do the actual imparting of skills to the apprentices. There is a mutual interest between the employer and the workers in proper standards for apprenticeship. Distrust and suspicion often develop when either one or the other undertakes the training program alone. It was pointed out to the committee by employers and employees that industry and labor are being brought together by the Federal Committee on Apprentice Training in a most effective manner to work out and administer apprentice programs and that young people are being assisted thereby to secure training which fits them for profitable employment and responsible citizenship. The experience of this close cooperation between management and labor on questions of apprenticeship may be expected to influence beneficially other negotiations between management and labor, with the consequent benefits to the whole Nation.

Both the employer and employee representatives before the committee expressed themselves to the effect that the appropriation which had been requested for this work was inadequate. There was unanimous agreement, however, that the bill should be passed. The National Youth Administration and the United States Office of Education also endorsed the measure.

No opposition was registered with the committee.

* * *

81 Cong. Rec. 6631-6633

APPRENTICES IN INDUSTRY

Mrs. NORTON. Mr. Speaker, by direction of the Committee on Labor I call up the bill (H. R. 7274) to enable the Department of Labor to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices and to cooperate with the States in the promotion of such standards, and ask for its immediate consideration.

Mr. THOMPSON of Illinois. Mr. Speaker, I make the point of order a quorum is not present.

Mr. RANKIN. We will pass this bill tonight unless the House adjourns on a roll call, if we have to stay here until midnight.

Mr. THOMPSON of Illinois. Mr. Speaker, I withdraw my point of order for the moment.

Mr. MARTIN of Massachusetts. I renew the point of order Mr. Speaker.

The SPEAKER. The gentleman from Massachusetts makes the point of order a quorum is not present.

Mr. MARTIN of Massachusetts. Mr. Speaker, I think the minority members of the Committee on Labor are not aware this bill is coming up. I think they should be here and have a chance to be heard if we are going on with it.

Mrs. NORTON. Mr. Speaker, will the gentleman withhold his point of order?

Mr. MARTIN of Massachusetts. Yes; I withhold my point of order for the moment, Mr. Speaker.

Mr. COX. May I appeal to the gentleman from Mississippi that he kindly not object to the unanimous-consent request of the gentleman from Texas?

Mr. RANKIN. If the gentleman will let the call of committees proceed, when it gets down to the Committee on World War Veterans' Legislation I am willing to let him dispense with further proceedings under the call of committees, but I am not going to withdraw my objection until the World War Veterans' Committee is called.

Mr. COX. The gentleman has that right, of course.

The SPEAKER. Does the gentleman from Massachusetts withhold his point of order?

Mr. MARTIN of Massachusetts. I must insist on my point of order, Mr. Speaker.

The SPEAKER. The gentleman declines to withhold his point of order. A constitutional question has been raised that a quorum is not present. The Chair will count.

Mr. MARTIN of Massachusetts. Mr. Speaker, I withdraw the point of order for a moment.

The SPEAKER. The gentleman from Massachusetts withdraws his point of order.

Mrs. NORTON. Mr. Speaker, by direction of the Committee on Labor I call up the bill (H. R. 7274) to enable the Department of Labor to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices and to cooperate with the States in the promotion of such standards, and ask for its immediate consideration.

The Clerk read the title of the bill.

Mrs. NORTON. Mr. Speaker, I ask unanimous consent that the bill may be considered in the House as in Committee of the Whole.

The SPEAKER. The gentlewoman from New Jersey asks unanimous consent that the bill may be considered in the House as in Committee of the Whole. Is there objection?

Mr. MARTIN of Massachusetts. Mr. Speaker, reserving the right to object, before we give this permission I think we should know something about the bill. We are somewhat handicapped because we did not expect it to come up at this time.

Mrs. NORTON. Mr. Speaker, I may say to the gentleman from Massachusetts that the author of the bill, the gentleman from Connecticut [Mr. FITZGERALD], is here and will be pleased to explain the measure.

I may say further that the bill was reported out unanimously by the Committee on Labor before I became chairman of that committee. I have looked up the record and I have found that the vote of the committee was unanimous.

Mr. MARTIN of Massachusetts. I think the rest of the House should know something about the bill, and under my reservation of objection, in order that we may know what the bill is about, I yield to the gentleman from Connecticut.

Mr. FITZGERALD. Mr. Speaker, this bill sets up in the Department of Labor an apprentice training system for the youth of this country. We have debated here today

for hours about taking 300,000 boys and putting them into the forest of America. This bill will provide a cloak of protection to put around boys and girls and encourage them to go back into the skilled trades, and in some localities today we have a crying need for trained and skilled workers.

Mr. MARTIN of Massachusetts. Just what does the bill do?

Mr. FITZGERALD. The bill sets up standards by Federal cooperation with the States and through the formation of voluntary committees in the States, throwing a cloak of protection around the boys and girls and setting up standards and protecting them and guaranteeing that when their time of service in a trade has expired, they will come out full-fledged mechanics. It also incorporates vocational education in the plants.

Mr. HOFFMANN. [sic] Mr. Speaker, will the gentleman yield for a question when he concludes his statement?

Mr. FITZGERALD. Yes. the bill was heard by a subcommittee of the Committee on Labor and representatives of labor and capital appeared. I may say this is, perhaps, the only bill before the House today that both labor and capital are in favor of. The National Manufacturers Association wrote the committee and went on record in favor of the bill and Mr. John Frey represented the American Federation of Labor before the committee, testifying in favor of the bill.

If you really want to do something for the youth of the country, this is one of the best bills you can pass,

because it will encourage them to learn a skilled trade as a means of livelihood.

In the past 25 years over one million and a quarter mechanics have come here from the European countries, and I am going to tell the Members of the House now that if a bill of this nature is not passed and a system of this kind is not established, within 10 years you will lower your immigration bars in order to get mechanics from across the water. We have a need for mechanics in special lines today. Industry is crying for them and still we are passing laws here to put the youth of our country into the forests, instead of encouraging them to go back into the trades and become skilled mechanics.

Mr. HOFFMAN. Mr. Speaker, will the gentleman yield?

Mr. FITZGERALD. Yes.

Mr. HOFFMAN. In the New York Times of yesterday and in the same paper the day before there was a long article each day by a special writer who had been investigating conditions in Michigan, and in the article the statement was made that the W.P.A. and the C.I.O. were interested and that the C.I.O. had contributed some \$6,000 in Michigan for the purpose of educating the youth there along certain lines. If the Department of Labor establishes this school, what connection, if any, will the C.I.O. workers have with the undertaking?

Mr. FITZGERALD. This bill does not propose to establish schools, but it proposes to protect the boys and girls in industry.

Mr. HOFFMAN. It proposes to educate them.

Mr. FITZGERALD. While they are getting practical knowledge, so that a boy, after serving an apprenticeship of 4 years, will not be exploited, but when he has served his apprenticeship he will be a first-class mechanic.

Mr. HOFFMAN. The question I want to ask the gentleman is this: What part has the C.I.O. in the training of these young men and women?

Mr. FITZGERALD. It has nothing to do with it, to my knowledge.

Mr. HOFFMAN. The W.P.A. has something to do with it, according to this article.

Mr. FITZGERALD. I do not know about that, but I do know that the bill is endorsed by both labor and capital.

Mr. HOFFMAN. Will not the C.I.O. furnish the teachers if the training is under the present Secretary of Labor?

Mr. FITZGERALD. The training is going to be done by the employers in the various industries.

Mr. HOFFMAN. But under the supervision of the Department of Labor?

Mr. FITZGERALD. The standards will be set up by the Department of Labor in cooperation with the States.

Mr. HOFFMAN. With the cooperation of Mme. Perkins?

Mr. FITZGERALD. The Department of Labor.

Mr. MARTIN of Massachusetts. Will the gentleman tell us whether the committee went into the cost of the administration of this bill?

Mr. FITZGERALD. Approximately \$56,000 has been the amount provided previously. This activity has been functioning under the National Youth Administration.

If the gentleman will recall, 2 months ago, when the Committee on Appropriations had that part of the bill under consideration, they would not pass it, because that committee claimed it was not removed legally from the National Youth Administration into the Department of Labor. Both the minority and the majority parties on the committee are in favor of making that small appropriation of \$56,900.

Mr. MARTIN of Massachusetts. And this is transferring it to the Department of Labor?

Mr. FITZGERALD. Yes.

Mr. MARTIN of Massachusetts. And then setting up a standard for the apprenticeship, for the different States?

Mr. FITZGERALD. Yes.

Mr. MARTIN of Massachusetts. It is all voluntary?

Mr. FITZGERALD. Yes.

Mr. MARTIN of Massachusetts. It is not compulsory?

Mr. FITZGERALD. No. In fact, 45 States have set up State committees already, and 112 voluntary committees are working, and these States already have passed these plans during the last year. There was no opposition before the committee.

Mr. DITTER. Mr. Speaker, I reserve the right to object. Will the gentleman from Connecticut please tell us what the power of the National Advisory Committee will be?

Under section 2 the Secretary of Labor is authorized to appoint a National Advisory Committee to serve without compensation. Will the gentleman tell us what the duties and powers of that committee will be?

Mr. FITZGERALD. They will set up a voluntary plan. It is national because some association wrote and asked that the name be changed to the National Association or the National Committee, to make it function with the States.

Mr. DITTER. Then to that extent the Secretary of Labor will be able to carry out and formulate a policy with respect to the several States.

Mr. FITZGERALD. Not unless the States agree to it.

Mr. DITTER. But the Secretary of Labor is authorized to appoint the members of the Committee. There is no reservation, no limitation with respect to the authority of the Secretary of Labor.

Mr. FITZGERALD. The States adopt their own plan.

Mr. DITTER. I am speaking now of the National Advisory Committee. The gentleman said the National Advisory Committee's duties and powers would be to formulate policies. I say to that extent the influence of the Secretary of Labor will be expressed through the appointees of this committee.

Mr. FITZGERALD. The committee will be appointed through the State agencies.

Mr. DITTER. I am afraid that the gentleman and I are in disagreement. Under section 2 the Secretary of Labor has authority to appoint the committee. It does not say

anything except to appoint this national committee. It delegates that authority directly to the Secretary of Labor.

Mr. FITZGERALD. That is, the national committee sets up with the State organization a voluntary plan. Everything in this is voluntary.

Mr. DITTER. And to that extent, then, the Secretary of Labor's influence will be felt in the administration of the proposed act.

Mr. FITZGERALD. I would not say so.

Mr. DITTER. How is it to be obviated?

Mr. FITZGERALD. Because it will be voluntary on the part of a State whether it accepts the act or not.

Mr. DITTER. What is the power of the committee?

Mr. FITZGERALD. Just making recommendations; that is all.

Mr. MARTIN of Massachusetts. Mr. Speaker, I am satisfied with the explanation of the gentleman from Connecticut and I withdraw my reservation of objection.

The SPEAKER. Is there objection to the request of the gentlewoman from New Jersey to consider the bill in the House as in Committee of the Whole?

Mr. HOFFMAN. Mr. Speaker, I reserve the right to object in order to ask the gentleman a question.

The SPEAKER. The gentleman from Michigan reserves the right to object.

Mr. HOFFMAN. Here is the article to which I referred, and it says about \$7,000 is set aside [sic] by the

union each month for this educational program from its income of \$350,000 a month, and it ties in with the W. P. A. If this committee is established by the Department of Labor to teach these young men and women and qualify them to follow a trade, how does that hook up with this?

Mr. FITZGERALD. I do not see any connection at all with it, because all this bill does is this: After a boy is in a plant, working, he is indentured to learn a trade in the plant, working for the company. After he is indentured, these standards will be set up for his protection. He will get his practical experience right there. His vocational education he will get through the trade school.

Mr. HOFFMAN. But these schools are to be set up in these plants, and the C. I. O. is furnishing \$7,000 a month to assist in that. Does not that tie up directly with this?

Mr. FITZGERALD. No.

The SPEAKER. Is there objection to the request of the gentlewoman from New Jersey?

There was no objection.

The SPEAKER. The Clerk will report the bill.

* * *

No. 95-789

In The
Supreme Court of the United States
October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS; COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.;
MANUEL J. ARCEO DBA SOUND SYSTEMS MEDIA,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

RICHARD N. HILL
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

QUESTION PRESENTED

Does the Employee Retirement Income Security Act of 1974 (ERISA) preempt a State's ability to enforce its prevailing wage laws, contrary to the terms of an apprenticeship training program which constitutes an employee welfare benefit plan within the meaning of ERISA?

AFFILIATED COMPANIES

Respondent Dillingham Construction, N.A., Inc. is a privately held corporation. Its parent companies are Dillingham Construction Corporation and Dillingham Construction Holdings, Inc. A related subsidiary corporation is Dillingham Construction Canada, Ltd.

Respondent Manuel J. Arceo dba Sound Systems Media is a sole proprietorship, not a corporation.

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STATEMENT OF THE CASE

When Sound Systems Media ("Sound Systems") began work on the Sonoma County Main Adult Detention Facility in early 1988, it was signatory to a collective bargaining agreement with International Brotherhood of Electrical Workers Local 202. That collective bargaining agreement contained a separate wage scale for apprentice electronic technicians and required Sound Systems to make contributions to an ERISA apprenticeship program, the Northern California Sound and Communications Joint Apprenticeship and Training Committee. That apprenticeship program was approved by the California Apprenticeship Council. Petitioners' Appendix 26 (hereinafter "Pet. App.>").

Shortly after Sound Systems began work on the project, Local 202 disclaimed interest in representing the electronics technician employees of Sound Systems. In response to this unexpected development, Sound Systems was forced to seek out another collective bargaining partner. Pet. App. 26.

In June 1988, one month after the disclaimer of interest by Local 202, Sound Systems signed a new collective bargaining agreement with the National Electronic Systems Technicians Union ("NESTU"). The NESTU collective bargaining agreement also contained an apprentice wage scale, and it created a new apprenticeship program, the Electronic and Communications Systems Joint Apprenticeship and Training Committee ("E&C JATC"). During the period of time that Sound Systems performed the bulk of its work on the project, the new E&C JATC

was in existence, but it had not yet been approved by the California Apprenticeship Council. Pet. App. 26-27.

The new E&C JATC applied to the California Apprenticeship Council for approval in August 1989, and it was approved in October 1990. However, the approval was not retroactive. Pet. App. 27.

In reliance on its collective bargaining agreement with NESTU, Sound Systems employed several apprentices on the project and paid them wages and benefits in accordance with the collective bargaining agreement. Even though Sound Systems previously participated in the Northern California Sound and Communications Joint Apprenticeship and Training Committee and the new E&C JATC was eventually approved, the State has taken the position that Sound Systems violated California's prevailing wage laws by not paying journey-level wage rates to all employees working on the project. Pet. App. 27.

On appeal to the Ninth Circuit, after the district court dismissed their complaint for declaratory relief, Respondents argued that (1) the State's enforcement of its prevailing wage laws was contrary to the terms of a collective bargaining agreement and therefore preempted by the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.* (see *Bechtel Construction, Inc. v. United Brotherhood of Carpenters*, 812 F.2d 1220 (9th Cir. 1987)); (2) the State's interference with the collective bargaining process entitled Respondents to recover damages and attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988 (see *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986)); and (3) the State's enforcement of its prevailing

wage laws was preempted by ERISA, 29 U.S.C. § 1001, *et seq.*

The Ninth Circuit did not reach the NLRA preemption issue or the claim for damages brought pursuant to 42 U.S.C. § 1983, ruling instead that the State's enforcement of its prevailing wage law against Sound Systems was preempted by ERISA. Pet. App. 22.¹ In resolving the ERISA preemption issue, the Ninth Circuit's ruling was a narrow one. The Court did not strike down California's entire prevailing wage law; instead, it merely ruled that the challenged application of the prevailing wage statute was preempted, leaving California free to apply its prevailing wage law to any situations where ERISA does not override state law.

REASONS FOR DENYING THE WRIT

I. There Is No Direct Conflict Between The Circuits Warranting Supreme Court Review.

Respondents concede that the Ninth Circuit and the Eighth Circuit interpret the Fitzgerald Act differently for purposes of applying ERISA's savings clause. The Ninth Circuit views the Fitzgerald Act (29 U.S.C. § 50) as a statement of principles and a directive to the Secretary of

¹ It is unfortunate that the Ninth Circuit did not base its decision on grounds of NLRA preemption. Such a ruling would have been a straightforward application of the Ninth Circuit's earlier decision in *Bechtel Construction, Inc. v. United Brotherhood of Carpenters*, 812 F.2d 1220 (9th Cir. 1987) and would have attracted very little attention or controversy.

Labor to cooperate with State agencies in promoting apprenticeship; however, the Act does not authorize the States to enforce federal law. Pet. App. 17-18. See also *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719, 731 (9th Cir. 1989), cert. denied, 498 U.S. 822 (1990). The Tenth Circuit Court of Appeals shares this view of the Fitzgerald Act. *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555, 1562 (10th Cir. 1992), cert. denied, 113 S. Ct. 406 (1992) (the Fitzgerald Act "merely seeks to facilitate development of apprenticeship programs – it does not mandate apprenticeship programs or seek to discourage other training programs"). In contrast, the Eighth Circuit interprets the Fitzgerald Act as giving State agencies the authority to apply federal apprentice standards for federal purposes. *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975, 980 (8th Cir. 1995).

One possible reason the Ninth and Eighth Circuits have expressed different views regarding the Fitzgerald Act is that they were addressing different issues and were attempting to answer very different questions. In *Minnesota Chapter ABC*, the Eighth Circuit was confronted by a wholesale attack on the State's entire prevailing wage statute, whereas the Ninth Circuit below faced a narrow attack on the application of a state prevailing wage law to a specific situation.

The plaintiffs in *Minnesota Chapter ABC* argued that the Minnesota Prevailing Wage Law was preempted in its entirety because the statute defined the prevailing wage to include contributions for "health and welfare benefits, vacation benefits, pension benefits, and any other economic benefit" paid to the relevant group of employees.

Minn. Stat. § 177.42, subd. 3. That issue – whether a state prevailing wage statute is preempted because of the way that the prevailing wage is calculated – has come before several Courts of Appeals with different results. See *Minnesota Chapter ABC v. Minnesota*, 47 F.3d at 978-980 (no preemption); *Keystone Chapter ABC v. Foley*, 37 F.3d 945 (3rd Cir. 1994), cert. denied, 115 S. Ct. 1393 (1995) (same); *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989) (that portion of the New York prevailing wage statute dealing with "supplements" held preempted).

Along the same lines, the plaintiffs in *Minnesota Chapter ABC* argued that the apprentice portion of Minnesota's Prevailing Wage Law was preempted because it contains an exemption for apprentices who are "employed and registered in a bona fide apprenticeship program registered with the U.S. Department of Labor or with a state apprenticeship agency." Minn. R. 5200.1070, subp. 2. If the Eighth Circuit had agreed with the plaintiffs, the entire exemption for apprentices would have been eliminated, and no employer would have been permitted to pay lower wages and benefits to apprentices in training.

This case, in contrast, does not involve an attempt to judicially repeal an entire state prevailing wage law. The Ninth Circuit merely held that California could not apply its prevailing wage law to the apprentices employed by Sound Systems. Pet. App. 17-18. In this respect, there is no direct conflict between the decisions of the Eighth and Ninth Circuits because the issues addressed are substantially different in scope.

There is another unexplored, but potentially significant, distinction between Minnesota and California prevailing wage laws which makes it difficult to compare this case to the Eighth Circuit's decision in *Minnesota Chapter ABC*. The apprentice exemption contained in Minnesota's Prevailing Wage Law allowed for approval by either the State apprenticeship agency or the U.S. Department of Labor. As a result, the Eighth Circuit concluded that Minnesota was not imposing any state standards or requirements "independent and apart from the regulation authorized and provided for by the Fitzgerald Act and its accompanying regulations." *Minnesota Chapter ABC v. Minnesota*, 47 F.3d at 980-981, quoting *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270, 274 (9th Cir. 1991), cert. denied, 112 S. Ct. 2991 (1992). The Nevada apprentice exemption at issue in *MacDonald* was precisely the opposite of Minnesota's Prevailing Wage Law: it required an apprenticeship program to obtain approval from both the State apprenticeship agency and a federal agency. Since the Nevada State Apprenticeship Council refused to approve an apprenticeship program that had previously been approved by the Federal Bureau of Apprenticeship Training, it was clear that Nevada was regulating apprenticeship programs above and beyond the authorization given by the Fitzgerald Act. *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d at 274.

In this case, it is unclear if California is attempting to impose standards and regulations in addition to those set forth in the Fitzgerald Act. Most importantly, no evidence was presented in this regard, and the district court therefore made no findings of fact with respect to the amount

of the overlap between the Fitzgerald Act regulations and the standards sought to be imposed by the California Apprenticeship Council.

Although no evidence was presented below, there are several reasons to believe that California's apprenticeship standards are more stringent and demanding than those authorized by the Fitzgerald Act. For example, the California Supreme Court previously invalidated one provision of the California Apprenticeship Council regulations on grounds of ERISA preemption because it contained a requirement not found in the Fitzgerald Act or the accompanying regulations. *Southern California Chapter ABC v. California Apprenticeship Council*, 4 Cal. 4th 422 (1992). Specifically, the California Supreme Court invalidated the regulation (8 Cal. Code Regs. 212.2) which permitted the California Apprenticeship Council to deny approval to an apprenticeship program if it would adversely affect an existing apprenticeship program.² Since the Fitzgerald Act and the accompanying regulations did not contain a similar requirement, the California Supreme Court ruled that the regulation was preempted by ERISA. *Southern California Chapter ABC v. California Apprenticeship Council*, 4 Cal. 4th at 450-453.

Other provisions of the current California Apprenticeship Council regulations appear to impose standards and requirements in addition to those contemplated by the Fitzgerald Act. For example, section 208 now contains a complex minimum wage formula for apprentices that is

² See *Southern California Chapter ABC v. California Apprenticeship Council*, 4 Cal. 4th at 434 n.9 for the full text of the regulation invalidated by the California Supreme Court.

far beyond what the Fitzgerald Act requires. See App. 1-3. Similarly, Section 212(14) of the California Apprenticeship Council regulations require an apprenticeship program to contain "training in the recognition of illegal discrimination and sexual harassment." App. 7. There is no comparable requirement in the Fitzgerald Act or its implementing regulations.

If a ruling in this case should happen to depend on the extent to which California's apprenticeship standards are above and beyond those authorized by the Fitzgerald Act, this Court would be required to make the initial factual determinations. There is not an adequate record in this case to make such determinations, not to mention this Court's obvious reluctance to act as a finder of fact.

II. The Ninth Circuit Utilized the Correct Preemption Analysis.

This Court's recent decision in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671 (1995) has no application to the instant case. The *Travelers* decision provided a model for measuring the farthest reach of ERISA preemption in those cases where the challenged statute or law does not have a "reference to" an ERISA plan, but does have a "connection with" an ERISA plan. 115 S. Ct. at 1677. Because the California statute at issue here makes specific "reference to" ERISA plans (i.e., apprenticeship programs), it is presumptively preempted.

The statute challenged in *Travelers* required hospitals to collect surcharges from patients covered by a commercial insurance company but not from Blue Cross or Blue

Shield patients, and it subjected certain health maintenance organizations (HMOs) to surcharges dependent on the number of Medicaid patients enrolled. Explaining the meaning of the "relate to" clause in ERISA's preemption provision, the *Travelers* Court quoted from *Shaw v. Delta Airlines*, 463 U.S. 85, 96-97 (1983): "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." 115 S. Ct. at 1677. The Court quickly ruled out the possibility that the surcharge statute makes "reference to" an ERISA plan, noting that the surcharges are imposed regardless of whether the insurance coverage or HMO membership is secured by an ERISA plan. *Id.* The Court then proceeded to determine if the surcharge laws have a "connection with" ERISA plans. It was in the context of grappling with the "connection with" prong of ERISA preemption analysis that the Court cautioned against "uncritical literalism" and pointed out that "infinite connections" cannot be the measure of ERISA preemption. *Id.*

This case involves the "reference to" prong of ERISA preemption analysis which the Court ruled out in *Travelers*. The statute at issue in this case – California Labor Code § 1777.5 dealing with the employment of apprentices upon public works – makes numerous "references to" apprentices, apprenticeship standards and apprenticeship committees. Pet. App. 58-63. Since ERISA defines an "employee welfare benefit plan" to include any plan, fund or program maintained for the purpose of providing "apprenticeship or other training programs" (29 U.S.C. § 1002(1)), the "reference to" an ERISA plan is beyond doubt. See *New York State HMO Conference v. Curiale*, 64

F.3d 794, 799-800 (2d Cir. 1995) (a state law has a "reference to" ERISA if its text mentions or alludes to ERISA plans and it affects ERISA plans in some measure.)

Where a statute is found to have a "reference to" an ERISA plan, preemption is automatic; no further analysis of the "connection with" standard is required. *New York State HMO Conference v. Curiale*, 64 F.3d at 799. As this Court explained in one of its earlier ERISA preemption decisions, a state statute which "specifically refers to employee welfare benefit plans regulated by ERISA is preempted on that basis alone." *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. 580, 583 (1992). The same automatic or presumptive preemption analysis applies to this case.

The preemption analysis in *Travelers* was so difficult because the surcharge statute had only an indirect effect on ERISA plans. The *Travelers* Court emphasized that the surcharges made Blue Cross and Blue Shield more attractive insurance alternatives and therefore had an indirect effect on the choices made by insurance buyers, including ERISA plans. 115 S. Ct. at 1679. Similarly, the surcharges affected only indirectly the prices of insurance policies, a result, the Court observed, no different than that caused by many other non-preempted state laws. 115 S. Ct. at 1683.

Here, in contrast, the enforcement of a state prevailing wage law has a direct and immediate effect on an apprenticeship training program. In two recent cases following its *Dillingham* decision, the Ninth Circuit has squarely addressed Petitioners' argument, observing that application of a state prevailing wage law to apprentices

directly affects apprenticeship programs not approved by the State. *ABC National Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343, 347 (9th Cir. 1995) (California prevailing wage statute); *Inland Empire Chapter v. Dear*, 1996 U.S. App. LEXIS 2572 (9th Cir. 1996) (Washington prevailing wage statute). In *ABC National Line Erection Apprenticeship Training Trust*, the Ninth Circuit concluded that: "[t]he market for apprenticeship programs simply does not equate with the market for health care providers" at issue in the *Travelers* case. 68 F.3d at 347. Variations in the cost of health care are unremarkable and commonplace, whereas contractors could not afford to employ apprentices if they were forbidden to pay lower wage and benefit rates to apprentices in unapproved programs. *Id.*

III. The ERISA Coverage Issue Advanced by Amicus Curiae Was Not Decided Below And There Is No Conflict Among The Lower Courts

This is not the proper time or place to brief the merits of the ERISA coverage issue raised by *Amicus Curiae Building and Construction Trades Department, AFL-CIO*. Suffice it to say that this argument ignores the explicit statutory definition of an employee welfare benefit plan. 29 U.S.C. § 1002(1). This problem aside, there are two compelling reasons why the Court should not grant review of this issue.

First, whether ERISA's reach is limited to the funding and financial aspects of an apprenticeship training program was not fully litigated below. The State Petitioners did not raise this issue at any time, and consequently,

neither the district court nor the Ninth Circuit purported to decide this issue of ERISA coverage. See Pet. App. 11-12, 32-33. Although a different *amicus curiae* (the Northern California Pipe Trades Council) devoted two pages of its Ninth Circuit brief to this issue, that was not sufficient to attract the Ninth Circuit's attention. Since this argument was waived in the lower courts by the State Petitioners and there is no lower court ruling on this issue to review, this case is not the appropriate vehicle to review the ERISA coverage issue raised by *Amicus Curiae*.

Second, both courts which have addressed the ERISA coverage issue raised by *Amicus Curiae* have ruled that ERISA applies to written apprenticeship standards as well as the funding aspects of an apprenticeship program. *Hydrostorage, Inc. v. Northern California Boilermakers*, 891 F.2d 719, 728 (9th Cir. 1989); *Southern California Chapter ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 436-438 (1992). As the Ninth Circuit explained in *Hydrostorage*, both the financial trust and the apprenticeship standards form "integral part[s] of a larger 'program' established for the purpose of providing 'apprenticeship . . . training'" and the larger program is an employee welfare benefit plan under ERISA. *Hydrostorage*, 891 F.2d at 728.

No lower court has reached a contrary conclusion regarding ERISA's application to apprenticeship and training programs. Since there is no difference of opinion among the lower courts on this issue, review by the Supreme Court is unnecessary at this point in time.

IV. The Ninth Circuit Correctly Rejected The Market Participant Theory Advanced By *Amicus Curiae*

The distinction between a State acting as a market participant and a regulator most recently explored by this Court in *Building & Constr. Trades Council v. Associated Builders*, 113 S. Ct. 1190 (1993) does not assist Petitioners or the *Amicus Curiae*. In the context of this case, the State's application of its prevailing wage law to Sound Systems was clearly a regulatory act.

In concluding that the Massachusetts Water Resources Authority was acting as a market participant in allowing the project manager to negotiate a project labor agreement for a public works project, this Court emphasized that "the challenged action in this case was specifically tailored to one particular job, the Boston Harbor clean-up project." *Building & Constr. Trades Council v. Associated Builders*, 113 S. Ct. at 1198. The bid specification being challenged required successful bidders to sign the project labor agreement, but the bid specification did not apply to any other project.

A State's enforcement of its own apprenticeship standards and prevailing wage law amounts to regulation because the effects of the State's actions are not limited to a particular job. When a State requires an apprenticeship program to obtain State approval before apprentices can be used on a public works project, the State-imposed apprenticeship standards dictate how apprentices are paid and trained on other jobs as well. State approval of an apprenticeship program does not permit an employer to ignore the apprenticeship standards on purely private contracts.

In rejecting the market participant argument in this case, the Ninth Circuit correctly observed that application of a state prevailing wage law to apprentices is not limited to a particular job:

California in this case is not acting merely as a "market participant" rather than a regulator. The state's involvement does not end with the awarding of the contract. Section 1777.5 is aimed at regulating contractors who work on public contracts. The Division [of Apprentice Standards], part of a state agency, monitors and enforces violations of section 1777.5. This amounts to regulation, not merely "market participation."

Pet. App. 18-19, quoting *Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 891 F.2d at 730.

A market participant analysis is appropriate when a public agency, "acting in the role of purchaser of construction services, acts just like a private contractor would act." *Building & Constr. Trades Council v. Associated Builders*, 113 S. Ct. at 1199. This observation exposes the flaw in the market participant argument because a private contractor would never attempt to dictate the wages and benefits Sound Systems could pay to its apprentice employees and would never require Sound Systems to obtain approval of its apprentice program as a condition of employing apprentices on a private construction project. These are the actions of a regulatory agency, not a market participant.

In a similar context, District Court Judge Wilken characterized as "wholly unpersuasive" the State of California's argument that enforcement of its prevailing wage

laws is proprietary, not regulatory, action. *WSB Elec., Inc. v. Curry*, 18 E.B.C. 2036, 2045 (N.D. Cal. 1994). The market participant argument advanced by *amicus curiae* deserves the same short shrift.

Finally, it should be noted that the market participant argument is wholly inconsistent with the State's position regarding the Fitzgerald Act and ERISA's savings clause. The argument that the Fitzgerald Act leaves the States free to impose their own apprentice standards and prevailing wage laws ultimately rests on the public policy considerations motivating those laws. The Third Circuit recognized this inconsistency in *Keystone Chapter ABC v. Foley*, 37 F.3d 945 (1994). Rejecting a similar market participant argument regarding Pennsylvania's Prevailing Wage Act, the court observed that the state was attempting to justify its actions on the basis of its traditional police power – the "right to establish labor standards." 37 F.3d at 955-956 n.15. Similarly, in *WSB Elec., Inc. v. Curry*, 18 E.B.C. 2036 (N.D. Cal. 1994), Judge Wilken observed that "Defendants [including the State of California] make much of the public policies effectuated by the prevailing wage statutes; their contradictory argument that the statutes constitute no more than the acts of a party in the marketplace are wholly unpersuasive." 18 E.B.C. at 2745.

—————◆—————

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

RICHARD N. HILL

LITTLER, MENDELSON, FASTIFF,

TICHY & MATHIASON

A Professional Corporation

650 California Street, 20th Floor

San Francisco, California 94108-2693

Telephone: (415) 433-1940

Counsel for Respondents

Dillingham Construction, N.A., Inc.

and Manuel J. Arceo dba

Sound Systems Media

DATED: March 14, 1996

App. 1**Chapter 2. California Apprenticeship Council****Subchapter 1. Apprenticeship****Article A-1. General Provisions**

* * *

**Article 3. Standards for Minimum Wages,
Maximum Hours and Working Conditions****§ 208. Wages, Employee Benefits, and Other Compensation for Apprentices.**

(a) For Apprentices In all Occupations Except The Building And Construction Industry:

For apprentices participating in approved apprenticeship programs in all industries, except the building and construction industry, the beginning wage rate, employee benefits and other compensation, and the progression of those rates, shall be decided by the sponsoring program in consultation with the Chief DAS.

(b) For Apprentices In the Building And Construction Industry Employed On Public Works Projects:

For apprentices participating in approved apprenticeship programs in the building and construction industry, the wages and employer payments for employees benefits as defined in * C.C.R. § 16000. For apprentices participating in approved apprenticeship programs in the building and construction industry, the minimum hourly wage package for apprentices while employed on projects not

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covered by Subsection (b) above shall be calculated as follows:

(1) The hourly wage package for first period apprentices shall be no less than 140 percent of the annual poverty level rate for a family of three (3) published by the United States Department of Health and Human Services in the February preceding the rate determination, (beginning with the February, 1994 published rate), which annual rate shall then be divided by 1,936 hours to determine the hourly wage package;

(2) A minimum of 85 percent of the hourly wage package as determined by the formula above must be paid directly to the apprentice as taxable wages;

(3) Where an employer elects to satisfy a portion of the hourly wage package by employer payments for employee benefits as defined in 8 C.C.R. § 16000, the payment of such contributions must be verifiable, and the employer shall submit its books and records to an audit by the DAS staff, upon request, to verify such payments;

(4) The hourly wage package for first period apprentices shall be recalculated as of January 1 of every odd numbered year using the formula set out in Subsection (c)(1) above, and shall be based upon the figures published by the United States Department of Health and Human Services in February of the year preceding the recalculation. The recalculated hourly wage package for first period apprentices shall automatically become effective as of January 1 of each year in which it is recalculated for all new apprentices indentured after January 1 of that year;

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(5) Each apprentice shall receive periodic, equal percentage increases in the hourly wage package for each successfully completed period of apprenticeship. The minimum amount of the periodic, equal percentage increases must be sufficient to insure that in no event shall the apprentice's hourly wage package in the final period of apprenticeship be less than 190 percent of the hourly wage package required under Subsection (c)(1), above, in effect during the apprentice's first period of apprenticeship;

(6) At least 75 percent of each periodic increase in the hourly wage package as set out in Subsection (c)(5), above, must be paid directly to the apprentice in the form of taxable wages. For each period increase, any increase above the minimum hourly wage package is not subject to this restriction;

(7) Existing apprenticeship programs already approved by the DAS and the CAC which are not in compliance with any aspect of this total wage package formula for apprentices on all projects which are subject to Subsection (c) shall have one year from the effective date of this regulation (October 6, 1995), or until the expiration of the current collective bargaining agreement covering the program, whichever is later, to come into full compliance.

(8) By the enactment of this regulation, it is not the CAC's intent to change the manner by which the Director of Industrial Relations currently determines the prevailing wage rate, and the provisions of this Subsection (c) shall not be used to determine the prevailing wage rate.

(d) For All Apprentices

Nothing in the Section shall permit the payment of less than the minimum wage prescribed by the Federal Labor Standards Act or any applicable State minimum wage order.

* * *

Article 4. Apprenticeship Standards

* * *

§ 212. Content of Apprenticeship Program Standards.

Apprenticeship programs shall be established by written standards approved by the Chief DAS. In order to be approved, the standards must cover all work performed within the apprenticeable occupation. The standards also must contain:

(a) Evidence of:

(1) work site facilities and equipment sufficient to train the apprentices:

(2) skilled workers as trainers at the work site who meet the criteria for journey person or instructor as defined in Section 205(a) or (b)

(3) adequate arrangements for related and supplemental instruction pursuant to Labor Code section 3074;

(4) ability to offer training and supervision in all work processes of the apprenticeable occupation;

(5) provisions for evaluation of on-the-job training and related and supplemental instruction;

(6) compliance with applicable federal regulations and standards for the apprenticeable occupation involved;

(7) the program's ability, including financial ability, and commitment to meet and carry out its responsibility under the federal and state law and regulations applicable to the apprenticeable occupation and for the welfare of the apprentice;

(8) the program's ability and commitment to train apprentices in accordance with current industry and/or trade specific training criteria, work processes, and related and supplemental instruction;

(b) A statement of:

(1) the occupations(s);

(2) The parties to whom the standards apply and the program sponsor's labor market area, as defined by Section 215 appendix 2(1), for purposes of meeting equal employment opportunity goals in apprenticeship training;

(3) the definition and duties of the apprentice;

(4) the working conditions of the apprentice;

(5) the wage, employee benefits and other compensation of the apprentice, as set by Section 208;

(6) the ratio or number of apprentices to be employed and the method used to determine the ratio;

(7) the mechanism that will be used to provide apprentices with reasonably continuous employment in the event of a lay-off or the inability of an employer to

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provide training in all work processes as outlined in the standards;

(8) the procedure for incorporating the provisions of the standards into the apprentice agreement;

(9) the procedure utilized for the periodic review and evaluation of the apprentice's progress in job performance and related instruction; the procedure utilized for the maintenance of appropriate progress records; and the procedure utilized for the recording and maintenance of all records concerning apprenticeship and otherwise required by law.

(c) Provisions for:

(1) establishment of an apprenticeship committee, if applicable;

(2) administration of the standards;

(3) establishment of rules and regulations governing the program;

(4) determining the qualifications of employers if other than single employer programs;

(5) determining the qualifications of apprentice applicants;

(6) a system for recording the apprentice's worksite job progress and progress in related and supplemental instruction;

(7) progressively increasing the wages of the apprentice consistent with the skill acquired.

(8) discipline of apprentices, including provisions for fair hearings;

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(9) terminating, or recommending the cancellation of, apprentice agreements;

(10) recommending issuance of State certificates of Completion of Apprenticeship pursuant to Section 224;

(11) revising standards as needed;

(12) safe equipment;

(13) facilities for training and supervision, both on the job and in related instruction, in first aid, safe working practices and the recognition of occupational health and safety hazards;

(14) training in the recognition of illegal discrimination and sexual harassment;

(15) fair and impartial treatment of applicants for apprenticeship, selected through uniform selection procedures, which shall be an addendum to the standards, pursuant to Section 215;

(16) mobility between employers when essential to provide exposure and training in various work processes in the apprenticeable occupation;

(17) approval of the standards by the Chief DAS;

(18) the mechanism to be used for the rotation of the apprentice from work process to work process to assure the apprentice of complete training in the apprenticeable occupation;

(19) an orientation, workshop, or other educational session for employers to explain the apprenticeship program's standards and the operation of the apprenticeship program;

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(20) the on-going evaluation of the interest and capacity of individual employers to participate in the apprenticeship program and to train apprentices on-the-job;

(d) The names and signatures of the parties.

MAR 25 1996

In The
Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS; COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.; MANUEL J.
ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

**Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit**

REPLY BRIEF

JOHN M. REA, Chief Counsel,
(Counsel of Record)
VANESSA L. HOLTON,
Asst. Chief Counsel,
FRED D. LONSDALE, Sr. Counsel,
JAMES D. FISHER, Counsel,
SARAH COHEN, Counsel,

H. THOMAS CADELL, JR.,
Chief Counsel,
RAMON YUEN-GARCIA,
Counsel,

State of California
Department of Industrial
Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 972-8900

State of California
Division of Labor
Standards Enforcement
45 Fremont Street,
Suite 3220
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 975-2060

*Counsel for State Petitioners
Department of Industrial
Relations Division of
Apprenticeship Standards*

*Counsel for State Petitioners
Division of Labor Standards
Enforcement and County of
Sonoma*

5 P17

The following is submitted in reply to matters raised in the Brief in Opposition filed by Respondents Dillingham Construction, N.A., Inc. and Manuel J. Arceo, dba Sound Systems Media.

ARGUMENT

(1) Respondents seek in vain to obscure the direct conflict among the circuits on the issue presented by the Petition which is whether a state with a minimum wage law covering workers on public works projects is preempted by ERISA from providing an apprentice-specific wage limited to *bona fide* apprentices. The Ninth Circuit held in this case that California may not limit an apprentice-specific wage to apprentices in registered programs, while the Eighth Circuit upheld just such a limitation in *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995). Respondents, in fact, concede that there is a conflict in the circuits. They seek to minimize that conflict by suggesting that the courts were answering different questions and that the result in California under the Ninth Circuit rule is less draconian since it only invalidates an application of the prevailing wage law and not the entire law. If the approach urged by Respondents were applied to the Minnesota law, however, the entire apprentice exception could be invalidated. This result, plainly in conflict with the policy behind the Fitzgerald Act, argues strongly for Court resolution of this important question. The fact that different circuits may reach different results may sometimes be explained because each circuit is beginning with only the facts of the case before it but the task for this Court is not to explain how each circuit may

have reached the result it did, but rather to harmonize the results so that there is no longer a conflict.

(2) Respondents incorrectly suggest that this case may require the Court to consider factual matters not in the record concerning the state approval process. This is simply not the case. The program in question was given state approval but this contractor sought to pay the apprentice-specific wage during the period before the approval was effective. The standards for approval, which the program did meet, are therefore not in issue. In any case, the Ninth Circuit expressly held that California law is preempted regardless of whether California law contains "independent state standards apart from those set forth in the federal regulations under the Fitzgerald Act." Pet. App. 17. Moreover, the regulation Respondents have submitted as an example of a standard which may exceed the Fitzgerald Act, App. 1-3, only went into effect in October 1995, years after this case was decided in 1991. Finally, the California Supreme Court decision in *Southern California ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992) makes clear that the state may not apply standards for approval which are separate from those in the Fitzgerald Act regulations.

(3) Respondents in their discussion of this Court's decision in *New York State Conference of Blue Cross and Blue Shield Plans et al. v. Travelers*, ___ U.S. ___, 115 S.Ct. 1671 (1995), incorrectly assert that California law directly refers to ERISA apprenticeship plans and is thus "automatically" preempted. In fact, the state law refers to apprentices and apprenticeship programs and these terms are not coextensive with ERISA plans. See Petition 22-23.

Respondents point out that the Ninth Circuit has considered the effects of *Travelers* in two subsequent cases, finding ERISA preemption in each case. *ABC National Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343 (9th Cir. 1995); *Inland Empire Chapter v. Dear*, 1996 U.S. App. LEXIS 2572 (9th Cir. 1996). These additional Ninth Circuit cases demonstrate that this important conflict in the circuits is not one which will go away. Even after considering the Court's admonitions in *Travelers*, the Ninth Circuit continues to adopt an overly broad view of preemption and an overly narrow view of the scope of the savings clause under ERISA. This erroneous construction leads to results which impair congressional intent as expressed in the Fitzgerald Act.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN M. REA, Chief Counsel,
(Counsel of Record)

VANESSA L. HOLTON,

Asst. Chief Counsel,

FRED D. LONSDALE, Sr. Counsel,

JAMES D. FISHER, Counsel,

SARAH COHEN, Counsel,

State of California

Department of Industrial
Relations

Office of the Director

Legal Unit

45 Fremont Street, Suite 450

San Francisco, CA 94105

(Mailing Address:

P.O. Box 420603,

San Francisco, CA 94142)

(415) 972-8900

Counsel for State Petitioners

Department of Industrial

Relations Division of

Apprenticeship Standards

H. THOMAS CADELL, JR.,

Chief Counsel,

RAMON YUEN-GARCIA,

Counsel,

State of California

Division of Labor

Standards Enforcement

45 Fremont Street,

Suite 3220

San Francisco, CA 94105

(Mailing Address:

P.O. Box 420603,

San Francisco, CA 94142)

(415) 975-2060

Counsel for State Petitioners

Division of Labor Standards

Enforcement and County of

Sonoma

No. 95-789

Supreme Court, U.S.
FILED
JAN 10 1996

In The
Supreme Court of the United States
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STANDARDS ENFORCEMENT, DIVISION OF
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Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI

JAMES P. WATSON
(Counsel of Record)
LAWRENCE H. KAY, Esq.
KELLY A. RYAN
STANTON, KAY & WATSON
7801 Folsom Boulevard, Suite 350
Sacramento, California 95826
(916) 381-7868

Counsel for Amicus Curiae
California Apprenticeship Coordinators Association
and
Foundation for Fair Contracting

17P

QUESTION PRESENTED

Whether ERISA preempts those portions of California's prevailing wage law, California Labor Code Section 1720, *et seq.*, which grant an apprenticeship exemption to the prevailing wage rate for only those apprentices employed in a bona fide apprenticeship program registered with the State of California.

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I. INTEREST OF AMICUS CURIAE

With the written consent of all parties, Amicus Curiae California Apprenticeship Coordinators Association (hereinafter "CACA") and the Foundation for Fair Contracting (hereinafter "FFC"), file the following brief in support of the Petition for Writ of Certiorari of the California Department of Industrial Relations (hereinafter "DIR"), Division of Labor Standards Enforcement (hereinafter "DLSE"), and the County of Sonoma (hereinafter "County") to review the June 7, 1995 decision of the Ninth Circuit Court of Appeals in *Dillingham Construction v. County of Sonoma*, 57 F.3d 712 (9th Cir. 1995), reprinted in the Appendix to the Petition for Writ of Certiorari ("App.") at App. 1-12.

CACA is a California nonprofit corporation whose members represent labor-management joint apprenticeship committees ("JAC's") from all of the California construction industry's union/management joint apprenticeship programs. CACA represents over fifty JAC's under whose auspices 25,000 registered apprentices are being trained throughout the State of California.

The member JAC's of CACA are governed by committees consisting of equal numbers of union representatives and management representatives. The labor organizations represent the apprentices registered in programs approved by the State of California. The management representatives represent the contractors who employ such apprentices on both private and public construction work in the State of California. Those contractors who perform public construction work in California are governed by the prevailing wage requirements found

in California Labor Code section 1720, *et seq.* They benefit from the apprenticeship exemption from the prevailing wage requirement which was challenged in this litigation.

The Foundation for Fair Contracting ("FFC") is a joint labor-management California non-profit corporation which monitors public works projects to determine whether contractors are complying with California's prevailing wage laws. The employer member organizations of FFC include the Associated General Contractors of California, the Association of Engineering Construction Employers and the Engineering and Utility Contractors Association. The members of these associations serve on the JAC's and employ apprentices on both private and public construction work throughout Northern California. The union member organizations of FFC include Operating Engineers Local Union No. 3, Northern California District Council of Laborers, Northern California District Council of Cement Masons and the California and Vicinity District Council of Ironworkers. All of these unions participate in state approved apprenticeship programs.

Both CACA and FFC believe that the prevailing wage laws and the regulation of apprenticeship programs are important to the taxpayers and citizens of California since they provide a mechanism to allow public agencies in California to contract for meaningful training of young people, minorities and women on state public works construction.

The State of California permits contractors to pay rates lower than prevailing journeyman wage rates to apprentices registered with its Division of Apprenticeship

Standards ("DAS"). The State has a vested interest in allowing contractors to pay a lower wage rate to apprentices in training during their apprenticeship, because it encourages on-the-job training on public works projects.

The Ninth Circuit decision in *Dillingham* will create chaotic conditions in the construction industry. Contractors who employ apprentices will be working under different regulatory requirements, depending upon whether a project is state-funded and governed by the State's prevailing wage laws or is federally funded and subject to the prevailing wage requirements of the federal Davis Bacon Act, 40 U.S.C. § 276a, *et seq.* *Dillingham* will allow unscrupulous employers to evade the prevailing wage law by enrolling their employees in unapproved sham apprenticeship programs which will permit them to claim the apprenticeship exemption.

CACA and FFC are concerned about the continued viability of their members' JAC's and the potential loss of millions of dollars invested in training centers, staff and equipment which have been utilized to train over 25,000 registered apprentices throughout the State of California.

Before the *Dillingham* decision, State approval of each apprenticeship program and registration of apprentices was a precondition for exemption from the prevailing wage law. Only contractors who were certified to train apprentices under the standards of an apprenticeship program approved by the State of California, Division of Apprenticeship Standards, were allowed to pay less than the prevailing journeyman wage rate for work performed by apprentices. This assured that only bona fide apprenticeship programs would qualify for the reduced rate.

Because of the *Dillingham* decision, confusion and uncertainty exists among CACA's and FFC's labor and management representatives as to how the State of California will enforce the prevailing wage requirements for apprentices. *Dillingham* will make it possible for contractors to establish sham apprenticeship programs which will not provide training to workers, and which will allow contractors to pay any apprentice wage rate they choose, thereby creating a competitive advantage for those contractors not interested in providing meaningful training opportunities for young people, minorities and women.

II. STATEMENT OF THE CASE

In April 1987, Respondent Dillingham Construction N.A., Inc. (hereinafter "Dillingham"), entered into a public works contract with Petitioner County for the construction of the Sonoma County Main Adult Detention Facility. Dillingham subcontracted part of the work to Elenex Corporation, which in turn subcontracted to Manuel J. Arceo dba Sound Systems Media ("Sound Systems"). *Dillingham, supra*, 57 F.3d at 715-16. The project was subject to California's prevailing wage laws; all non-apprentice employees were required to be paid the predetermined prevailing wage.

On October 20, 1989, petitioner DLSE, after an investigation, filed a Notice to Withhold in the sum of \$45,103.37 on the funds due Dillingham under the contract with the County, pursuant to California Labor Code section 1727, for the failure of Sound Systems to pay the prevailing wage rates. California Labor Code section 1775

makes Dillingham liable for the failure of its subcontractors to pay prevailing wages. The County withheld the funds as required by law. See California Labor Code section 1727. Dillingham and Sound Systems contested the notice, arguing that some of the Sound Systems workers were "apprentices," and that they were entitled to pay them less than the journeyman rate. The workers were not indentured as apprentices under State law and were not receiving state-approved training.

Dillingham and Sound Systems filed suit against the petitioners, alleging that the state's right to enforce the prevailing wage law is preempted by Section 514(a) of ERISA, 29 U.S.C. § 1144(a) because such enforcement would "relate to" an employee benefit plan. Petitioners now seek review in this Court.

III. REASONS FOR GRANTING THE WRIT

A. Certiorari Should be Granted to Establish that ERISA does not Preempt California's Prevailing Wage Law which Provides an Exemption to the Prevailing Wage Rate for only those Apprentices Employed in a Bona fide Apprenticeship Program Registered with the State of California.

The Ninth Circuit's decision in *Dillingham* held that the State of California could not exempt from the prevailing wage requirements only those apprentices working for employers who provide training pursuant to State approved apprenticeship programs. Simplistically applying the test of whether state prevailing wage enforcement "relates to" an employee benefit plan, the Court concluded, with very little analysis, that ERISA preempts state apprenticeship wage enforcement. In doing so, the

Court ignored the State's paramount interest in assuring that all employees receive a fair wage, and that employers not be permitted to evade the prevailing wage requirement by dubbing some workmen "apprentices" when there is no evidence that they are receiving any approved apprenticeship training whatsoever. The effect of the decision is to authorize an employer to pay apprentice wages to workers it claims are "apprentices," even when their "apprenticeship program" is not approved by the State of California, and even where there is no proof that the employer has any training program established, or has trained any apprentices.

This Court recently noted that the concededly broad reach of ERISA preemption is not limitless, and cannot appropriately be used to eradicate significant state programs which impact on employee benefit plans in only peripheral ways. See *N.Y. Conference of Blue Cross v. Travelers Ins. (Travelers)*, ___ U.S. ___, 115 S. Ct. 1671 (1995). Like *Travelers*, *Dillingham* presents the Court with an instance in which ERISA preemption will create great mischief while providing no significant benefit to the federal scheme of ERISA enforcement.

B. The Court Should Grant Certiorari to Reconcile Conflicting Decisions in the Lower Courts.

Review by this Court is necessary in order to reconcile the conflicting decisions of the circuit courts with regard to ERISA preemption of state prevailing wage laws and the authority of the states to regulate apprenticeship programs.

In *Minnesota Chapter of Associated Builders and Contractors, Inc. (ABC) v. Minnesota Department of Labor and Industry (Minnesota)*, 47 F.3d 975 (8th Cir. 1995), *reh'g and sugg. for reh'g en banc denied* (Apr. 3, 1995), the court held that ERISA did not preempt the Minnesota prevailing wage law provisions which granted an apprenticeship exemption to the prevailing wage rate for apprentices employed in a bona fide apprenticeship program registered with the U. S. Department of Labor or with a state apprenticeship agency. The Ninth Circuit's decision in *Dillingham* reaches an opposite conclusion under almost identical circumstances.

In *ABC v. Minnesota, supra*, the Court held that the Minnesota prevailing wage law does not affect relations between ERISA entities or alter the structure of ERISA plans merely because it requires an employer to compensate employees at the prevailing wage rate. *Id.*, 47 F.3d at 978. The court stated that imposition of any wage rate could potentially increase costs to the employer, but the incidental impact produced by the prevailing wage law was too tenuous, remote and peripheral to lead to preemption. *Id.* at 979, citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100, n.21 (1983), the court stated:

"The regulation of labor on state-funded construction projects falls within the scope of the state's traditional police power which we must presume that Congress did not intend to preempt." *ABC v. Minnesota*, 47 F.3d at 979, citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 555 (6th Cir. 1987).

In determining whether Minnesota's prevailing wage law is preempted by ERISA because it "relates to" ERISA plans, the Eighth Circuit used a seven factor test previously applied in *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital, Inc.*, 947 F.2d 1341, 1344 (8th Cir. 1991), *reh'g denied* (Jan. 13, 1992), *cert. denied*, 112 S. Ct. 2305 (1992).

"These factors include whether the state law: (1) negates an ERISA plan provision; (2) affects relations between primary ERISA entities; (3) changes the structure of ERISA plans; (4) affects ERISA plan administration; (5) affects ERISA plans economically; (6) exercise traditional state power; and (7) may be preempted consistent with other ERISA provisions. *Arkansas Blue Cross & Blue Shield*, 947 F.2d at 1344-45 (citations omitted). These factors must be assessed in light of the 'totality of the state statute's impact on the plan.'" *ABC v. Minnesota*, 47 F.3d at 978.

In applying this test, the Eighth Circuit found that prevailing wage law did not affect relations between ERISA entities, nor did it alter the structure of ERISA plans. *Id.* Furthermore, the court found the incidental impact on employers and ERISA plans by the prevailing wage law was "too tenuous remote and peripheral to lead to preemption." *Id.* at 979.

The Court went on to state:

"Here, the purpose of ERISA is not hindered by the Minnesota prevailing wage statute. The goal of ERISA preemption is 'to ensure benefit plans will be governed by only a single set of regulations,' *FMC Corp.*, 498 U.S. at 60, 111 S.

Ct. at 408, not to ensure employers uniform wage regulations across state or even county lines. The wage regulations of the Minnesota Prevailing Wage Law are simply a byproduct of our two-tiered federal system, which is not preempted by ERISA." *ABC v. Minnesota*, 47 F.3d at 979.

The Minnesota and California prevailing wage statutes are similar. In Minnesota and California, although the prevailing wage rate also includes a benefit component, benefits and wages can be used interchangeably to meet the required total prevailing wage "package." In *Keystone Chapter, Associated Builders and Contractors, Inc. v. Foley*, 37 F.3d 945 (3d Cir. 1994), the Third Circuit upheld a similar Pennsylvania prevailing wage statute and concluded:

" . . . [T]he Act and regulations merely require that the Secretary set a prevailing wage that consists of a cash component and may include a benefits component. Employers must pay the cash component of the wage in cash, but they may pay the benefits component either in benefits or cash. Any benefits they provide, regardless of type, would count toward the benefits component . . . " *Keystone*, 37 F.3d at 956.

The court concluded that ERISA does not require "a state to ignore the existence of ERISA benefits when considering overall remuneration to workers," and held that "a state can set a minimum cash wage, and allow an employer the option of paying part of that in benefits," without triggering ERISA preemption.

The California apprenticeship exemption to the prevailing wage law provides the same benefits and coverage as the laws in Minnesota and Pennsylvania which were not found to be preempted by ERISA.

The U.S. Court of Appeals for the Tenth Circuit reached an opposite result in *National Elevator Industry, Inc. v. Calhoun*, 957 F.2d 1555, cert. denied, 113 S. Ct. 406 (1992), underscoring the need for Supreme Court review of the relationship between state prevailing wage laws, apprenticeship programs and ERISA's preemption clause.

C. Certiorari Should be Granted Because Preemption of the Apprenticeship Exemption to California's Prevailing Wage Law Would Impair the Purposes of the Fitzgerald Act.

The Fitzgerald Act, 29 U.S.C. § 50, *et seq.*, directs the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices . . . to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with state agencies engaged in the formulation and promotion of standards of apprenticeship and to cooperate with the Secretary of Education in accordance with Section XVII of Title 20." The important federal interest in apprenticeship embodied in the Fitzgerald Act would be completely frustrated if state regulation of apprenticeship programs, which the Fitzgerald Act clearly contemplates and encourages, were to be preempted by ERISA. Moreover, the "savings clause" of Section 514(d) of ERISA, 29 U.S.C. § 1144(d) evidences Congress' intent not to disturb other federal

statutory schemes by inappropriate application of ERISA's preemption provision.

In *ABC v. Minnesota*, *supra*, the court took specific note of the federal interest, embodied in the Fitzgerald Act, in preserving apprenticeship programs.

" . . . [T]he apprenticeship exemption provisions of the prevailing wage statute are not preempted because preemption would impair the purposes of the Fitzgerald Act, 29 U.S.C. 50, in violation of ERISA's general savings clause. 29 U.S.C. at 1144(d).

The ERISA savings clause provides that 'nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.' 29 U.S.C. at 1144(d). The district court concluded that preemption of the apprenticeship portion of the prevailing wage law would 'impair the cooperative state jurisdiction over apprenticeship programs envisioned by the Fitzgerald Act.' *Minnesota Chapter*, slip op. at 9 (Apr. 27, 1993). Thus, the district court held that the apprenticeship provisions are saved from preemption. *Id.*; 29 U.S.C. at 1144(d)." *ABC v. Minnesota*, 47 F.3d at 980.

The Eighth Circuit reached its conclusion by relying on the Ninth Circuit's decision in *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), cert. denied, 505 U.S. 1204, 112 S. Ct. 2991 (1992). In *MacDonald*, the court applied ERISA's savings clause to avoid preemption of Nevada's apprenticeship exemption from the prevailing wage law. The Ninth Circuit should

have applied the same reasoning found in *ABC v. Minnesota* and *MacDonald*, and held that ERISA's savings clause saves California apprenticeship exemption from ERISA preemption.

IV. CONCLUSION

For all the foregoing reasons, Amici CACA and FFC respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

LAWRENCE H. KAY

*JAMES P. WATSON

KELLY A. RYAN

STANTON, KAY & WATSON

7801 Folsom Boulevard, Suite 350

Sacramento, California 95826

(916) 381-7868

Counsel for Amici CACA and FFC

*Counsel of Record

January 19, 1996

JAN 18 1996

CLERK

In The
Supreme Court of the United States

October Term, 1995

CALIFORNIA DIVISION OF LABOR
STANDARDS ENFORCEMENT, et al.,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A.,
and MANUAL J. ARCEO,
dba SOUND SYSTEMS MEDIA,

Respondents.

Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI

ROBERT E. JESINGER #59550
WYLIE, McBRIDE, JESINGER,
SURE & PLATTEN
101 Park Center Plaza, Suite 900
San Jose, CA 95113
(408) 297-9172

Counsel for Amici Curiae California Association of the Sheet Metal and Air Conditioning Contractors National Association, Sheet Metal and Air Conditioning Contractors National Association, Associated Plumbing & Mechanical Contractors, Sacramento Chapter of the National Electrical Contractors Association, Mechanical Contractors Association, Northern California Drywall Contractors Association, Associated Roofing Contractors, Plumbing Piping Industry Council, and Plumbing, Heating, Cooling Contractors of California

13/11/95

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CONSENT FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE

Petitioners and Respondent, through their counsel, have consented to the filing of this Brief *Amici Curiae*. The original form indicating the consent of all parties was submitted to the Clerk of this Court with the filing of this Brief *Amici Curiae*.

INTEREST OF AMICI CURIAE

All of the *Amici* are contractor associations whose members have participated in apprenticeship training programs and made substantial contributions to those programs in the State of California, and in some cases throughout the United States. Their member employers have in the past employed apprentices on California State and on Federal public works projects, utilizing the apprentice wage specific rate for these apprentices who are duly registered in programs approved by the State of California as meeting Federal standards.

California SMACNA (Association of Sheet Metal and Air Conditioning Contractors National Association) represents 440 contractors who perform work on commercial and residential air conditioning and heating, architectural sheet metal, industrial sheet metal, kitchen equipment, metal roofing, sheet metal fabrication, and manufacturing, testing and balancing of heat and air, siding and decking. They perform work throughout the western United States and employ and train 971 apprentices in the State of California.

The Sheet Metal and Air Conditioning Contractors' National Association, Inc. has approximately 1900 contractor members engaged in the sheet metal and air conditioning building and construction industry throughout the United States. Organized contractors in the sheet metal industry train and employ about 90,000 apprentices nationwide and pay approximately \$175,000,000.00 into local, regional and national training funds on an annual basis.

The Northern California Drywall Contractors Association represents 60 contractors working in the drywall insulation and taping industry in the 46 northern California counties. The Associated Roofing Contractors represent 20 large roofing contractors who perform work throughout the same 46 northern California counties. Their members train and employ about 600 apprentices.

The National Electrical Contractors Association, Sacramento Chapter, represents 60 electrical contractors active in industrial, commercial and residential electrical work throughout northern California and northern Nevada. These contractors train and employ over 160 apprentices.

The Plumbing & Piping Industry Council, Inc. represents 400 plumbing and piping contractors engaged in this business in the States of California, Arizona, Washington, Oregon, Utah, Colorado, Nevada, Idaho, and Hawaii. They train and employ some 1,000 apprentices.

The Associated Mechanical & Plumbing Contractors represent 50 contractors who perform plumbing and piping work in commercial, industrial and residential construction. This work takes place mostly in six northern

California counties. Together, these contractors train and employ approximately 100 registered apprentices.

The Mechanical Contractors Association represents 150 contractors who perform plumbing, piping, heating, air conditioning, and refrigeration work in industrial, commercial and residential construction. This work is performed in northern California and in Nevada. They train and employ approximately 650 registered apprentices.

The Plumbing, Heating, Cooling Contractors of California operates a California State approved unorganized apprenticeship program. It represents 400 contractor members who are engaged in high technology and public works jobs throughout California involving industrial, commercial and residential projects. Their program trains and their members employ approximately 600 apprentices.

The *Amici Curiae* support the Petition for Writ of *Certiorari* in *Dillingham v. State of California*, as reported at 57 F.3d 712 (9th Cir. 1995), and seek reversal of the opinion of the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

The conflict between the Ninth [*Dillingham*] and Eighth [*Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995)] U.S. Circuit Courts of Appeals decisions

means that the *Amici* Contractors face economic uncertainty and conflicting directives regarding the use of state registered apprentices on public works projects.

An apprentice specific wage rate (lower than that required to be paid to journey level workers on prevailing wage jobs) is essential for the *Amici* contractors to be able to use apprentices economically on public works projects. Apprentices are not as productive as journey level workers. Quality apprenticeship training is expensive. Yet, the effect of the Ninth Circuit opinion creates an economic disincentive for contractors to enter into apprenticeship agreements that meet the Federal standards for training. Before *Dillingham*, in order to pay the lower apprentice rate, a contractor had to objectively demonstrate that it was actually funding apprentice training to a minimum level. Now, unscrupulous contractors can withhold funding, yet still benefit by the lower wage scale. The *Amici* Contractors cannot ignore the economic realities of this inequity.

Contractors are also, as a result of the Ninth Circuit's opinion, subject to conflicting State regulation in that they must employ apprentices enrolled with State approved programs on Federal jobs in order to get the lower rate but need not employ such apprentices on State public works jobs. If contractors, because of this competitive disadvantage, pull out of approved apprenticeship programs (resulting in the cancellation of the financial commitment that those programs require), the programs will surely collapse. Apprenticeship training will become meaningless other than as a means of obtaining the lower wage rate allowed for utilizing apprentices by merely

representing that "apprentices" are being utilized on public works projects.

ARGUMENT

Contractors who voluntarily assume training responsibilities under apprenticeship agreements which meet Federal standards incur costs greater than their competitors who do not agree to meet such training standards. This is a cost which these contractors may not be able to afford with respect to public sector projects because of the competitive bidding statutes. These statutes generally require that the public agency award the bid to the "lowest responsible bidder." Following *Dillingham*, an unscrupulous contractor will be able to classify all of its workers at the lower apprentice specific wage rate, without having to meet the Federal standards for apprenticeship training, and thereby obtain a decisive bidding advantage over contractors who have assumed full financial and legal responsibility for meeting the higher and more costly training standards for State approved apprenticeship programs.

Thus, ethical contractors who do not wish to turn prevailing wage laws into the sham now permitted by *Dillingham* will lose public works bids to those contractors who are willing to style all of their workers as "apprentices" and pay them the lowest wages. They can pay the lowest wage after *Dillingham* without committing any resources to actually pay for apprentice off-the-job training. These unethical competitors will have an unfair economic advantage in the bid process by using "paper

only" apprentices, i.e., lower paid because they are called apprentices, not because they are being properly trained.

When competing employers submit bids for works governed by State prevailing wage laws, their estimates as to labor costs might be based on the assumption that all workers must be paid a journey level wage, or that all workers could be paid an apprentice level wage, or any variant in between those two extremes. However, the uncertainty as to what constitutes compliance with State prevailing wage law created by *Dillingham* inevitably produces a downward pressure on prevailing wages for State public works. This will occur because at the very least *some* contractors submitting bids will assume that a large segment of their work force could permissibly be classified as apprentices and thus be paid the lower wage rate. Competing bidders will have to likewise adjust their assumptions about permissible wage rates in order to have any hope of becoming the lowest bidder. Creation of such a downward pressure on prevailing wages through an entirely contrived devaluation of appropriate compensation rather than as a result of market forces is directly contrary to the legislative intent of the prevailing wage statutes – to insure that when the government engages in construction projects, in order to provide fair compensation for the employees working on those projects, the prevailing wage in the area is to be paid for the labor – not just the lowest possible price.

In essence, by stripping California's power to declare which employees can legitimately be paid a lower rate on public construction works, *Dillingham* invites an unseemly charade by competing contractors, a charade that is beyond scrutiny because of Federal preemption.

Workers who have years and years of experience in a trade can one day be issued the emperor's proverbial set of new clothes and become *instant apprentices* [for pay purposes]. Under *Dillingham*, the State is left with no authority to question such a charade, for questioning the legitimacy of their new apprentice status becomes the legal equivalent of saying the magic word, the duck comes down, and ERISA's preemptive effect trumps all. The result is that the prevailing wage statute is neatly and completely circumvented, allowing mischievous contractors to vastly underpay their work forces on public construction projects to the competitive detriment of responsible contractors who attempt to comply with the letter and the spirit of such employee-protective statutes. The net effect of *Dillingham's* application of ERISA preemption principles is that, through the rubric of preempting State regulation of apprenticeship, State regulation of employee wages is also preempted, swept away in the unbounded logic that such State statutes controlling wages "relate to" an apprenticeship plan, and are therefore preempted.

The Federal Davis-Bacon Act (40 U.S.C. §276a to §276a-5) rules regarding the payment of prevailing wages on Federal public works projects restrict the discounted wage rate to apprentices registered in approved programs. 29 C.F.R. §5.5(a)(4). *Dillingham* creates a different rule for State projects by eliminating the long standing requirement that a contractor utilize apprentices registered in approved programs in order to receive the wage break and pay the apprentice at the apprentice wage specific rate. Because of this anomaly, an unscrupulous

contractor can label a journey level worker an "apprentice" on a State public works project and pay the worker the lesser rate and then move the same worker to a Federal Davis-Bacon project and be required to pay the appropriate (and higher) rate of the journey level wage. The contractor could only avoid this inconsistency by registering the worker as an apprentice in a State approved program.

An even more anomalous result will occur if, in the middle of a State or local financed public works project, the public contracting agency receives Federal monies for the project. Will this require that the previously under paid apprentice be boosted up to the journey level rate of pay mid-contract term unless that employee is enrolled in a State approved program?

CONCLUSION

The Court should grant the Petition and review this case because the decision in *Dillingham* is bad for business, bad for the public, and bad for the workers. In this day of deregulation, it may seem odd that a group of construction contractors would welcome State regulation of apprenticeship prevailing wages. But there is a simple and logical reason for this.

Contractors plan for the present as well as the future. The *Amici* contractors are desirous of continuing a healthy, sustained and legitimate apprentice training environment. Indeed, the greatest challenge for construction companies (and indirectly the construction users) in the immediate future is to find a sufficient number of

skilled, trained journey level workers. The *Amici* contractors realize this all too well. To have any chance of creating a large enough pool of skilled construction workers, apprentice programs must include certain minimum training standards. Attracting and keeping good workers requires an "appropriate" prevailing pay rate for apprentices based upon the economic conditions in the State and locale in which they are working. It is not necessary that this appropriate prevailing pay rate be based upon union contract rates or non-union working conditions, but instead is appropriate if it is a prevailing rate. Indeed, Amicus Plumbing, Heating, Cooling Contractors of California presently maintains a State approved unorganized apprentice training program, subject to the same economic realities as the organized programs. However, maintenance of such prevailing rates on State public works projects will be severely eroded if *Dillingham* remains the law, thus eventually impeding the *Amici* Contractors' overall ability to maintain minimum training standards so as to produce a skilled labor force for their use.

Moreover, maintenance of such minimum training standards must necessarily be accomplished by the mandate of State prevailing wage laws rather than through voluntary private agreements. It would not be appropriate for employers to combine among themselves to agree upon this prevailing rate, without the anti-trust protections of a union contract, because this would violate the anti-trust laws. However, it is permissible for a State, acting as a regulator, to survey and determine the appropriate apprentice specific prevailing rate payable on State public works projects. California Labor Code §1777.5.

The *Amici* contractors have for years expended substantial sums of money to fund apprentice training programs. This has been economically possible because they could pay the State developed lower prevailing pay rates for their apprentices. This funded training and pay have encouraged apprentices to continue working in the industry and working towards the journey level skill and pay. In exchange for this substantial funding and participation in approved programs which establish minimum standards to insure the health of the apprentice training environment, the employers who expend such monies have been entitled to pay the lower rate to apprentices enrolled in these programs. The economics of this practice, which have provided business, the public and workers a healthy environment and sustained apprenticeship training growth for over 35 years before ERISA, has now been knocked upside down by the *Dillingham* preemption decision. It should be reviewed and evaluated by comparing the Congressional intent behind ERISA, and the Congressional intent behind the Fitzgerald Act, both of which cry out for a result other than the one delivered by the *Dillingham* Court.

Dated: January 19, 1996

Respectfully Submitted,

WYLIE, MCBRIDE, JESINGER,
SURE & PLATTEN

ROBERT E. JESINGER

No. 95-789

Supreme Court, U. S.

FILED

JAN 19 1996

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS; COUNTY OF SONOMA,
v. *Petitioners,*

DILLINGHAM CONSTRUCTION, N.A., INC.;
MANUEL J. ARCEO dba SOUND SYSTEMS MEDIA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE BUILDING AND CONSTRUCTION
TRADES DEPARTMENT, AFL-CIO
IN SUPPORT OF PETITIONERS**

MARSHA S. BERZON
SCOTT A. KRONLAND
177 Post Street
Suite 300
San Francisco, CA 94108

DONALD J. CAPUANO
LOUIS P. MALONE
4748 Wisconsin Avenue, N.W.
Washington, D.C. 20016

LAURENCE J. COHEN
TERRY R. YELLIG
1125 15th Street, N.W.
Suite 801
Washington, D.C. 20005

LAURENCE GOLD
(Counsel of Record)
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

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**BRIEF OF THE BUILDING AND CONSTRUCTION
TRADES DEPARTMENT, AFL-CIO
IN SUPPORT OF PETITIONERS**

The Building and Construction Trades Department, AFL-CIO, representing more than four million laborers and mechanics employed in the construction industry throughout the United States, and fifteen national and international labor unions, many of whose members are employed in the construction industry, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court. The fifteen national and international labor union members of the BCTD and the local building and construction trades unions with which they are affiliated together with employers signatory to collective bargaining agreements with those unions, presently spend more than \$300 million at the national and local levels to train approximately 170,000 apprentices a year at more than 1,000 training facilities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Apprenticeship is the traditional means by which a young person acquires a skilled trade. Pursuant to an indenture, the apprentice pledges several years of faithful service and receives in return a pledge of sufficient on-the-job training and supplemental instruction to become a journeyman under the accepted norms of the craft. See generally U.S. Department of Labor, Bureau of Apprenticeship and Training, *Apprenticeship: Past and Present* (1982).

To protect young people from exploitation and to promote apprenticeship, the federal government and a majority of states provide for registration of apprenticeship programs in accordance with a cooperative scheme set up by the National Apprenticeship Act of 1937 (the "Fitzgerald Act"), 29 U.S.C. § 50, and that Act's implementing regulations, 29 C.F.R. Part 29. Registration is voluntary but limited to programs in which certain

minimum labor standards are met. Those standards ensure that apprentices are not mistreated; that the ratio of journeypersons to apprentices on the job provides for adequate supervision and safety; and that the apprentice receives the training to become a recognized journeyperson competent to perform skilled work in a broad range of settings. See 29 C.F.R. §§ 29.5 & 29.6.

The federal and state laws setting minimum wage levels have, of necessity, required that special provision be made for apprentices. Thus, the federal Fair Labor Standards Act, Davis-Bacon Act, and Service Contract Act and their implementing regulations allow, under specified circumstances, for a subminimum wage to be paid to *bona fide* apprentices. See 29 C.F.R. § 4.6(p), § 5.5(a)(3)(ii)(B)(4)(i), & Part 521. California's prevailing wage law, which sets minimum wages on state public works projects, contains a similar provision for *bona fide* apprentices, as do virtually all state prevailing wage laws. See Petition for a Writ of Certiorari (Pet.) at n. 2.

The Ninth Circuit held in this case—in direct conflict with the holding in *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995)—that a state that provides a subminimum wage for apprentices, unlike the federal government, cannot *limit* the provision to *bona fide* apprentices, *i.e.* to apprentices in registered programs. According to the Ninth Circuit, such a limitation is preempted by the federal Employee Retirement Income Security Act (ERISA), as a state law that “relates to” an ERISA plan (ERISA § 514(a), 29 U.S.C. § 1144(a)) and is not saved from preemption by ERISA’s Savings Clause, § 514(d), 29 U.S.C. § 1144(d). The Eighth Circuit, by contrast, concluded that preempting a similar Minnesota statute would impair the operation of the Fitzgerald Act and its implementing regulations, and that the Minnesota statute is therefore “saved” from preemption by ERISA § 514(d).

As of 1990, there were more than 280,000 young people indentured to registered apprenticeship programs

in the United States, mainly concentrated in the building trades, where apprenticeship, not vocational school, still is the primary means by which a skilled craft is acquired. General Accounting Office, *Apprenticeship Training: Administration, Use and Equal Opportunity* 2, 16 (1992). The Ninth Circuit’s holding prohibits states from distinguishing these *bona fide* apprentices from workers who have been labeled “apprentice” by their employer as a subterfuge to qualify for a subminimum wage on public projects. The holding thus puts states in the Ninth Circuit to a Hobson’s choice of abandoning either (i) the minimum labor standards set for *all* workers on state projects, or (ii) the special provision for apprentices. The latter course would have the effect of making impractical the use of apprentices on state projects and of decreasing already scarce training opportunities for young people.

Because of the large number of individuals affected by any ruling weakening apprenticeship training programs and the importance of apprenticeship as a means of training young people in the skilled crafts, we are in full agreement with the Petition that the direct conflict among the circuits regarding application of ERISA’s Savings Clause presents an issue of national importance as to which this Court’s review is necessary. We submit this *amicus* brief to develop two points apart from the Savings Clause conflict, as to why the present case merits this Court’s review.¹ These points were addressed by the court below and are encompassed within the Question Presented and the Petition (*see* Petition at 22-23 & at 26 n. 13), but the Petition does not address them at length.

1. ERISA’s coverage provision, § 3(1), extends the reach of that statute to a “plan, fund or program . . .

¹ As California points out in the Petition, the question whether the ERISA Savings Clause saves from preemption state registration standards for apprenticeship programs that go *beyond* the minimum standards set forth by the Fitzgerald Act regulations is *not* at issue here. Petition at n. 14.

for the purpose of providing . . . apprenticeship or other training programs." The Ninth Circuit determined that the standards for training apprentices are part of an "apprenticeship . . . program" within the meaning of the coverage provision. The salient issue, however, given the language of the definitional provision in its entirety, actually is whether those standards are part of the "plan, fund or program" to *provide* an "apprenticeship . . . program." The language and structure of the coverage provision, when considered in light of the statutory objectives and the background against which ERISA was adopted, strongly suggest that only the *financial* aspects of defraying the costs of an apprenticeship program, not the *labor standards* pursuant to which the program itself is run, are within the ERISA definition of "employee welfare benefit plan." There is therefore a significant question, meriting this Court's review, as to whether California's prevailing wage law "relates to" an ERISA "welfare benefit plan" for purposes of ERISA's preemption provision.

2. There also is a significant issue for this Court as to whether the Ninth Circuit was correct in rejecting, as irrelevant to the preemptive scope of ERISA, the distinction between a state acting as regulator and a state acting as market participant. This distinction has been recognized by the Court in other contexts, based on the presumption that Congress ordinarily does not intend to override the states' traditional freedom to deal in the market on such terms, and with such persons, as the states may choose. Neither the language or objectives of ERISA suggest that Congress meant to reject the regulator/market participant distinction for purposes of preemption. The California procurement law at issue—which directly affects how a particular contract will be performed and furthers legitimate procurement interests—appears to resolve just the type of market participation question which Congress is ordinarily presumed to leave to the states.

ARGUMENT

1. *ERISA Coverage Issue*: This case presents a significant issue, meriting this Court's review, as to whether the lower courts have taken the wrong path in applying ERISA's coverage provision, § 3(1), 29 U.S.C. § 1002(1), in the context of apprenticeship programs. The Ninth Circuit's preemption holding rests on the conclusion that ERISA's definition of "employee welfare benefit plan" encompasses the substantive employment and training standards pursuant to which an apprenticeship program is run—the instruction apprentices will receive, the wages they will be paid, etc.—rather than merely the plan for defraying the *costs* of the apprenticeship program. According to the Ninth Circuit, the plain language of ERISA compels this conclusion. Pet. App. 10-11, citing *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719, 727-29 (9th Cir. 1989).

The Ninth Circuit, however, asked the wrong statutory question. Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines an "employee welfare benefit plan" within the coverage of the statute to include "any plan, fund or program . . . established or maintained by an employer or by an employee organization, or by both . . . for the purpose of providing for its participants or their beneficiaries" certain enumerated benefits or services (emphasis supplied). Included among the benefits and services listed in § 3(1)(A) are "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, *apprenticeship or other training programs*, or day care centers, scholarship funds, or prepaid legal services" (emphasis supplied).

The Ninth Circuit concluded that the training program at issue "was an 'apprenticeship or other training program' within the meaning of [§ 3(1)(A)]" (Pet. App. 10). The real coverage question, however, is not what constitutes an "apprenticeship or other training program"

but what Congress meant by a "plan, fund or program" to *provide* such a "program."

The structure of the coverage provision suggests that Congress meant to differentiate *between* the substantive "program" provided and the means for providing that program, not to conflate the two. At the least, the awkward, two-tier, linguistically repetitive structure of this provision precludes an obvious, plain meaning answer as to what Congress intended.

Consideration of the whole object and policy of the federal statute indicates that what Congress actually intended in the definition of "plan" in ERISA was to include as an ERISA "plan, fund or program" *only* the plan for supporting financially an apprenticeship program, *not* the set of *labor standards* followed by the "apprenticeship program" in training apprentices. Reading the ERISA coverage provision in light of the backdrop against which it was adopted confirms this narrower reading of that provision.

A state provision concerned solely with minimum labor standards for apprentices—like California's provisions for the voluntary registration of apprenticeship plans—therefore does not, without more, "relate to" an ERISA "plan" within the meaning of the ERISA preemption provision, even apart from whether the Savings Clause would apply to such state action.

a. At the outset, *Massachusetts v. Morash*, 490 U.S. 107 (1989), establishes that it is *not* enough to look to the words of the ERISA coverage provision in a vacuum in determining whether a matter is within the statutory coverage. The issue in *Morash* was whether "a company's policy of paying its discharged employees for their unused vacation time constitutes an 'employee welfare benefit plan' within the meaning of Section 3(1) of [ERISA]." 490 U.S. at 109.²

² Section 3(1) includes in the list of covered benefit programs, right before "apprenticeship or other training programs," "vacation benefits."

The *Morash* Court acknowledged that "[t]he words 'any plan, fund, or program . . . maintained for the purpose of providing . . . vacation benefits' may surely be read to encompass any form of regular vacation payments to an employee." 490 U.S. at 114. The Court declined to so read the coverage provision, however, because "[i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds." 490 U.S. at 115. Where the danger of mismanagement of accumulated funds is not present, the Court found it unlikely that Congress intended to subject employment-related programs to ERISA regulation. *Id.*³

The *Morash* Court recognized as well that "[t]he States have traditionally regulated the payment of wages" and related aspects of compensation, and including such compensation within the coverage of ERISA would displace state regulation in the area, with the result that "employees would actually receive less protection." 490 U.S. at 119. Where that would be the case, *Morash* concluded, courts should be "reluctant to so significantly interfere with the 'separate spheres of governmental authority preserved in our federalist system'." *Id.*, quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987). Finally, the *Morash* Court noted that "the extension of ERISA to claims for vacation benefits would vastly expand the jurisdiction of the federal courts, providing a

³ The *Morash* Court noted that, with respect to the types of benefits listed in § 3(1):

The distinguishing feature of most of these benefits is that they accumulate over time and are payable only upon the occurrence of a contingency outside the control of the employee . . . The reference[s] . . . in Section 3(1) should be understood to include within the scope of ERISA those . . . benefit funds, analogous to other welfare benefits, in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk. [490 U.S. at 115-16.]

federal forum for any employee with a vacation grievance" (490 U.S. at 118-19), a result Congress would not likely have intended in an age of already overcrowded federal court dockets.

The same analysis leads to the conclusion that the *financial* aspects of defraying the costs of apprenticeship instruction or program administration are covered by ERISA, but the labor standards aspects of apprenticeship training—such as the wages to be paid apprentices from an employer's general assets, the hours, work conditions and job assignments applicable on the job, and the content of the training and education received—are not. These aspects of apprenticeship simply "present none of the risks that ERISA is intended to address." *Morash*, 490 U.S. at 115. They involve no contingency other than the "ordinary" contingencies of the employment relationship (*id.* at 116), and generate no concern with the mismanagement of accumulated funds.

Moreover, the basic state function of registering privately sponsored apprenticeship programs and ensuring their ongoing integrity, recognized by the Fitzgerald Act, had long been the traditional province of the states when Congress enacted ERISA in 1974. It is unlikely that Congress intended in ERISA to displace that state function, and thereby leave apprentices with "less protection" than before ERISA was adopted. Congress also would not likely have intended to provide apprentices with a federal forum for benefit or fiduciary breach claims each time their employer denied them, for example, entry to a training program or assignment to a job.

b. The same conclusion follows from the language and structure of the ERISA coverage provision taken against the background at the time Congress adopted ERISA. A summary of that background shows that by the time ERISA was passed Congress had drawn a clear distinction between articulation and enforcement of apprenticeship *labor* standards on the one hand, and apprenticeship program *financial* standards on the other.

(i) Federal involvement in promoting apprenticeship labor standards began in 1934, when Executive Order No. 6750-C created the Federal Committee on Apprenticeship to work with representatives of labor, management and the states to set voluntary apprenticeship labor standards. The purpose of the 1937 Congress in adopting the Fitzgerald Act, 29 U.S.C. § 50, was to provide statutory authorization for this work to continue. H.R. Rep. No. 945, 75th Cong., 1st Sess. 2-3 (1937). By the time of the Act's passage, some 45 states had set up apprenticeship committees. *See* Pet. App. 117. The Fitzgerald Act was entitled "An Act to enable the Department of Labor to formulate and promote the furtherance of *labor standards* necessary to safeguard the welfare of apprentices and to cooperate with the States in the promotion of such *standards*." 50 Stat. 664 (1937) (emphasis supplied). And, the Act, in turn, directs the Secretary of Labor to "formulate and promote the furtherance of *labor standards*" for apprenticeship and "to cooperate with the State agencies engaged in the formulation of and promotion of *standards of apprenticeship*." 29 U.S.C. § 50 (emphasis supplied).

Pursuant to the Fitzgerald Act, the Secretary of Labor has promulgated regulations setting forth criteria for defining apprenticeable occupations and minimum standards governing apprenticeship training. The regulations, codified at 29 C.F.R. §§ 29.1-29.13, encourage the development by employers and labor organizations of apprenticeship training programs, and establish a procedure by which programs meeting minimum federal standards may be approved by the Bureau of Apprenticeship Training as eligible for federal assistance and certification and for other federal purposes. The federal regulations also enlist the states in the promotion of apprenticeship training by providing for the approval by the Secretary of state apprenticeship councils ("SACs") in states that have adopted apprenticeship laws and regulations meeting the

federal minimum requirements. The regulations delegate to an approved SAC the responsibility for certifying local apprenticeship programs.

Neither the Fitzgerald Act nor its implementing regulations, however, say *anything* about how apprenticeship programs are *financed*. Nor do the Act and regulations address the manner in which such a financing scheme would be administered; what they do require as a condition of registration, is that the apprenticeship program be conducted pursuant to "an organized, written *plan* embodying the terms and conditions of *employment, training, and supervision*." 29 C.F.R. § 29.5(a) (emphasis supplied).

(iii) Congress then addressed in 1959 the separate issue of the manner in which apprenticeship programs are *financed*. Because of the intermittent nature of employment in the construction industry, many fringe benefits are provided to union workers by jointly managed labor-management trust funds to which employers contribute. In 1959, Congress amended § 302(c) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186(c), to make clear the legality of using such trust funds to finance apprenticeship programs, so long as certain standards are followed with respect to fund administration. See Pub. L. 86-257, § 505, 73 Stat. 519, 537-38 (1959).

This amendment took the form of an exception to LMRA § 302's general ban on the payment by the employer of anything of value to the representative of its employees, for "money . . . paid by any employer for purposes of a trust fund established by such representative for the purpose of . . . *defraying the costs of apprenticeship or other training programs*," so long as, *inter alia*, "the detailed basis on which such payments are to be made is *specified in a written agreement*" and there are "provisions for an annual audit of the trust fund. . . ." 29 U.S.C. § 186(c)(6). Thus, the administration of

labor-management apprenticeship trust funds was brought within federal control. The concern of § 302(c), however, was with financial governance, not with the programmatic aspects directly affecting the apprentices, and the "written agreement" referred in § 302(c) concerns only the manner in which contributions are made to the fund financing the program. That "written agreement," in other words, is not the written "plan" referred to in the Fitzgerald Act regulations; the former covers *none* of the issues addressed by the latter.

Six years later, Congress amended the Davis-Bacon Act, which sets minimum wage rates for workers on most federal construction projects, to include certain fringe benefits within the definition of the "prevailing wage." See Pub. L. 88-349, 78 Stat. 238 (1964). Among those benefits are contributions "irrevocably made by a contractor or subcontractor to a trustee or to a third person *pursuant to a fund, plan, or program . . . for defraying costs of apprenticeship or other similar programs*." 40 U.S.C. § 276a(b) (emphasis supplied). The term "fund, plan, or program" in the Davis-Bacon Act was derived from § 3(a) of the Welfare and Pension Plans Disclosure Act ("WPPDA") (Pub. L. 85-836, 72 Stat. 997 (1958)), the predecessor federal statute to ERISA with respect to the regulation of welfare and pension plans. See S. Rep. No. 963, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2339, 2344 (explaining derivation).⁴ And the Davis-Bacon provision makes clear that, in context, the "fund, plan or program" in question is one that concerns how the *costs* of an apprenticeship "program" are defrayed (such as the "agreement" referenced in LMRA § 302(c)), not with the Fitzgerald Act "plan" containing the labor standards under which the apprenticeship program is run.

c. Having summarized the pertinent background, we return to the language of ERISA's coverage provision.

⁴ The WPPDA did not itself cover any aspect of apprenticeship.

Congress' adoption of the awkward two-tier structure referring to a "plan, fund or program" for providing apprenticeship "*programs*," rather than simply to a "plan, fund or program" to provide *apprenticeship*, strongly suggests that the "plan" covered by ERISA is the plan for defraying the costs of apprenticeship that is the subject of LMRA § 302(c) and the Davis-Bacon Act amendments, not the Fitzgerald Act "plan" containing an apprenticeship program's labor standards.⁵

Congress' unusual syntax obviously reflects a considered choice of words, as *none* of the other listed schemes is described as a "program." Moreover, the same, out-of-the-ordinary, syntax is employed in the Davis-Bacon amendments, which refer to a "fund, plan or program . . . for defraying costs of apprenticeship or other similar *programs*" (emphasis supplied). In that context, it is clear, as discussed above, that the "fund, plan or program" encompasses financial concerns, while the second reference to "programs" entails the substantive labor standards issues concerning apprentices.

ERISA § 3(1)(B) further provides that a plan providing "any benefit described in" LMRA § 302(c), 29 U.S.C. § 186(c), is covered by ERISA. And, LMRA § 302(c)(6), in turn, includes "a trust fund . . . established . . . for the purpose of defraying costs of apprenticeship or other training programs." Again the reference is to a plan for financing an apprenticeship program, not the plan for running the program.⁶

⁵ Congress could not, without drastically changing the structural parallelism of the ERISA coverage provision, have referred to a plan to "defray the costs of apprenticeship," as it did in the 1959 amendments to LMRA § 302 and the Davis Bacon Act amendments. A "plan" for purposes of ERISA § 3(1) is one that "provid[es] for its participants or their beneficiaries" one of the listed schemes. "Defray the costs of apprenticeship" is not a noun, and would not grammatically fit in the list.

⁶ The use of the same phrase, "apprenticeship or other training programs," in ERISA § 3(1)(A) and in LMRA § 302(c) suggests

d. The conclusion that the ERISA coverage provision encompasses only the plan for defraying the *costs* of apprenticeship also is suggested by the Secretary of Labor's regulations interpreting the ERISA coverage provision as not encompassing employer "plans" or "programs" that provide compensation to employees undergoing on-the-job training. See 29 C.F.R. § 2510.3(1)(b)(3)(iv) (excluding "[p]ayment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training"). As the Secretary explained in proposing that exclusion, "[a]lthough section 3(1) of [ERISA] can be read to include job-skill training within the term 'welfare plan,' such training is virtually inseparable from an employee's normal duties for which compensation is paid, and therefore is not treated as an employee benefit plan." 40 Fed. Reg. 24,643 (1975). And, that regulatory exclusion is but one part of a broader exclusion from ERISA for a variety of "payroll practices" (of which the *Morash* Court dealt with one), which amount to nothing more than the payment of ordinary compensation out of an employer's general assets. See 29 C.F.R. § 2510.3-1(b).

That is precisely what is at issue here: the payroll practice of paying wages to apprentices. And, these wages are paid from an employer's general assets, like the wages of every other employee, not from a fund set up to defray the costs of the apprenticeship program, which is used to pay for instructors and for program administration.⁷

that Congress intended to encompass the plans to *defray the costs* of apprenticeship that are included in § 302(c), but not to limit coverage to the union context or to plans that include formal trust funds. See *Massachusetts v. Morash*, 490 U.S. 107, 114 n. 9 (1989).

⁷ The only alternative reading of the Secretary's training regulations would be that as the existence of an ERISA "plan" turns simply on whether or not a separate fund has been created to finance the apprenticeship program. Otherwise identical apprentice-

e. In sum, the substantive program of apprentice training and employment, embodied in a Fitzgerald Act plan—in contrast to the separate “plan, fund or program” established to *finance* the instruction and administration involved in apprenticeship programs—implicates no area of ERISA regulation, does not resemble other benefit “plans” covered by ERISA, and involves an area traditionally regulated by the states. Congress therefore would not have intended ERISA’s coverage provision to encompass a “plan” simply covering the labor standard aspects of apprenticeship within the definition of an “employee welfare benefit plan.”

It remains, then, to apply this analysis to the statutory provisions governing whether the California law at issue

ship “plans” as that term is used in the Fitzgerald Act would be covered by ERISA, or not, depending *not* on any aspect of the training or employment condition provisions but upon upon the quite separate question of whether the financing for the “plan” comes from an employer’s general assets or from a separate fund.

Such an interpretation of ERISA produces absurd results. Moreover, only by applying a distinction between the financial and the programmatic aspects of other types of employee welfare benefit plans covered by ERISA does one obtain sensible results. The definition of “employee welfare benefit plan,” for example includes a “plan, fund, or program . . . established . . . for the purpose of providing . . . medical, surgical or hospital care or benefits . . . or day care centers . . . , or prepaid legal services.” 29 U.S.C. § 1002(1)(A) (emphasis supplied). Yet, it is unlikely that Congress intended that ERISA cover (and therefore preempt state law addressing) the substantive standards concerning the provision of medical care, or day care centers, or legal services, however that care or those centers or services are funded. Congress surely did not intend ERISA to regulate, for example—and we would not expect ERISA § 514(a) to preempt—state laws concerning the ratio of adults to children, or space requirements, or any other aspects of the manner in which children are cared for in day care centers. Nor is it likely that state laws covering the standard of care required of medical or legal professionals, or the licensing of day care personnel or nurses, are preempted by ERISA or not, depending upon the financial arrangements made to provide the care, centers, or services.

is preempted. Section 514(a) of ERISA provides that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a).” 29 U.S.C. § 1144(a). A state prevailing wage law that provides for the wages to be paid apprentices can only be said to “relate to” the minimum labor standards of apprenticeship programs, which, in turn, can only be said to “relate to” the plan by which the apprenticeship program is financed.

The Court recognized in *New York State Conference of Blue Cross v. Travelers Insurance Co.*, 115 S.Ct. 1671 (1995), however, that “[i]f ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course.” *Id.* at 1677. The question whether a state law “relates to” an ERISA plan must therefore be answered by considering “the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.” *Id.* And, when the ERISA coverage provision is properly read as including only the financial aspects of apprenticeship, it is clear that state involvement with apprenticeship *labor standards* is not the state action Congress sought to preempt.

At the least, there is a substantial question, meriting this Court’s review, as to whether, by interpreting the ERISA coverage provision too broadly, the Court of Appeal has extended ERISA’s already considerable preemptive shadow into an area of traditional state concern with which Congress never intended to interfere.

2. *Market Participant Issue:* This case also presents the Court with the opportunity to consider, in the context of ERISA preemption, the distinction between the state acting as regulator and the state acting as market participant. *All* the ERISA preemption cases decided to date by this Court concern state regulatory enactments restricting what private parties lawfully may do in their dealings with other parties both private and public. The Ninth

Circuit's decision, by contrast, extends the preemptive reach of ERISA to a state rule applicable *only* to transactions in which the state is purchasing services in the marketplace; *viz.* to a rule that private parties may ignore unless those parties voluntarily contract with the state.

Recognizing the importance of safeguarding the states' freedom to contract on such terms as they please, the Court has drawn a distinction, for purposes of determining whether the Commerce Clause restricts a state's freedom to act, between the state acting as regulator and the state acting as market participant. In the latter circumstance, there is no Commerce Clause restraint on the states. *See White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794 (1976). The Court has drawn a similar regulator/market participant distinction in determining whether state action is preempted by the National Labor Relations Act. *Compare Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986) with *Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S.Ct. 1190 (1993).

The Ninth Circuit rejected the argument that ERISA does not preempt California's prevailing wage law because Congress did not intend in enacting ERISA to displace state authority to set the terms on which the state would contract. Pet. App. 18-21. The Court of Appeals offered two reasons for this conclusion, neither of which is convincing.

First, the court below suggested that the regulation/market participant distinction, though recognized in NLRA preemption cases, has *no* relevance at all to ERISA preemption:

The NLRA contains no preemption clause. . . . [A] state's actions are only subject to preemption under the NLRA if it is *regulating* in a protected zone. ERISA, on the other hand, contains a broad preemp-

tion clause under which any state law which "relates to" an employee benefit plan is preempted. [App. 21 (citations omitted, emphasis in original).]

The question of federal preemption under ERISA, as under all other federal statutes, however, turns on Congress' intent, *see Travelers, supra*, 115 S.Ct. at 1677, and "the starting presumption [is] that Congress does not intend to supplant state law," particularly with respect to areas "historically a matter of local concern." *Id.* at 1676, 1680. The "basic thrust of the [ERISA] preemption clause . . . was to avoid a multiplicity of *regulation* in order to permit the nationally uniform administration of employee benefit plans." *Id.* (emphasis supplied). It therefore is not immediately clear why, when Congress' concern was, as is the usual case, with state *regulation*, ERISA should be interpreted uniquely as preempting state market participation.

Certainly nothing in the text of ERISA shows that Congress intended to reject the distinction between state regulation and state market participation recognized in other contexts. The textual indications are to the contrary: Section 514(c)(2) of ERISA, 29 U.S.C. § 1144 (c)(2), defines the term "State" for purposes of the ERISA preemption provision as including "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to *regulate*, directly or indirectly, the terms and conditions of employee benefit plans." (Emphasis supplied). The use of the term "regulate" in § 514(c)(2) provides an indication that preemption of state *regulation* is indeed what Congress had in mind in the ERISA preemption provision, not displacement of state authority to decide with whom the state will do business, and on what terms.⁸

⁸ We are not arguing that § 514(c)(2) provides a *limitation* on the state laws that otherwise would be preempted. *Cf. Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 141-42 (1990). The reference to state "regulation," however, does provide an indication that what Congress had in mind in adopting ERISA's preemption provision

Second, the Ninth Circuit also concluded that in this case "the state was not acting as a market participant . . . [because] [t]he state's application of its prevailing wage law has the 'effect and possibly the aim' of encouraging participation in a state-approved ERISA plan. . . ." Pet. App. 21 (citation omitted). But virtually every state action in the marketplace encourages or discourages private conduct. The procurement rule may well affect the mix of incentives that determine whether a particular employer chooses to set up a particular type of ERISA plan. That type of indirect economic effect on the choices of private parties, as the Court recognized in *Travelers, supra*, is not what the ERISA preemption provision is intended to reach. See 115 S.Ct. at 1679 ("An indirect economic influence, however, does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself.")

The case relied upon by the Ninth Circuit as an analogy, moreover, *Wisconsin Department of Industrial Relations v. Gould, supra*, involved a set of facts that are dramatically different from those here in several pertinent respects. In *Gould*, the Court held that the NLRA preempted a Wisconsin statute barring repeat violators of the NLRA from doing business with the state. The Court found that, while in form a procurement statute, the Wisconsin law was addressed to employer conduct unrelated to the employer's performance of any contractual obligations to the state and unrelated to the specific objects of any state purchasing decision. The Court therefore concluded that the statute cannot "even plausibly be defended as a legitimate response to state procurement restraints or to local economic needs." 475 U.S. at 291.⁹

is not different in kind from what Congress ordinarily has in mind when preempting state law.

⁹ See, applying a similar distinction between state regulation and state market participation in a Commerce Clause context, *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 99 (1984); compare *White v. Massachusetts Council of Construction*

By contrast, the California procurement rule at issue relates directly to how the *particular* contract being let is carried out, and responds to the state's interest in having *that contract* carried out properly. The restriction of the apprentice wage to *bona fide* apprentices—i.e. those in registered programs—ensures that apprentices on state projects are receiving adequate supervision and that safety rules are being followed. It also ensures that the "apprentice" wage is not used as a subterfuge for undercutting labor standards for journeyman, which are intended, in part, to assure quality workmanship and qualified workers on state projects. Finally, and not insignificantly, the restriction makes it possible for responsible contractors (who do not exploit their apprentices) to bid competitively on state projects.

The state rule invalidated below may provide some incentive to employ *bona fide* apprentices, but as stated, the Court recognized in *Travelers* that Congress did not intend ERISA to preempt every state action that may vary the economic incentives to employers or plan administrators in the benefits arena. Moreover, in light of the federal policy—embodied in the Fitzgerald Act—of cooperating with state efforts to formulate labor standards to protect apprentices, Congress would not have been concerned that the California rule might have the effect of encouraging participation in *registered* apprenticeship programs, rather than those in which minimum labor standards are not respected.¹⁰

Employers, supra, in which the Court upheld, against a Commerce Clause challenge, a city procurement rule setting residency requirements for employees of contractors on public works projects, noting that the employees are "in a substantial if informal sense, 'working for the city'" 460 U.S. at 211 n.7.

¹⁰ Nothing in California's procurement rule requires that private contracting parties *violate* any ERISA-imposed requirement in order to do business with the state. If that were the case, the pertinent preemption considerations obviously would be very different.

There is therefore, at the least, a substantial question, worthy of this Court's consideration, as to whether the Ninth Circuit has erroneously curtailed California's traditional freedom to act in the marketplace, doing business with such parties and upon such terms as the state may choose.

CONCLUSION

For the foregoing reasons as well as those discussed in the Petition for a Writ of Certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARSHA S. BERZON
SCOTT A. KRONLAND
177 Post Street
Suite 300
San Francisco, CA 94108

DONALD J. CAPUANO
LOUIS P. MALONE
4748 Wisconsin Avenue, N.W.
Washington, D.C. 20016

LAURENCE J. COHEN
TERRY R. YELLIG
1125 15th Street, N.W.
Suite 801
Washington, D.C. 20005

LAURENCE GOLD
(Counsel of Record)
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

NO. 95-789

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1995

STATE OF CALIFORNIA, Division of Labor Standards
Enforcement, Division of Apprenticeship Standards, Department
of Industrial Relations, County of Sonoma,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., Inc.,
Manuel J. Arceo, dba Sound Systems Media,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF WASHINGTON,
DELAWARE, KENTUCKY, MARYLAND,
MASSACHUSETTS, MONTANA, NEVADA, NEW JERSEY,
OREGON and the COMMONWEALTH OF PENNSYLVANIA
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

CHRISTINE O. GREGOIRE
*Attorney General
State of Washington*

LYNN D. W. HENDRICKSON
*JEFF B. KRAY
Assistant Attorneys General

*Counsel of Record
P.O. Box 40121
Olympia, Washington 98504-0121.
(360) 459-6571

[Additional counsel
on inside cover]

1344

M. JANE BRADY
Attorney General of Delaware
820 N. French Street
Wilmington DE 19801
(302) 577-3047

A. B. CHANDLER III
Attorney General of Kentucky
State Capitol, Room 116
Frankfort KY 40601
(502) 564-7600

J. JOSEPH CURRAN JR.
Attorney General of Maryland
200 Saint Paul Place
Baltimore MD 21202-2202
(410) 576-6336

SCOTT HARSHBARGER
Attorney General of Massachusetts
One Ashburton Place
Boston MA 02108-1698
(617) 727-2200

JOSEPH P. MAZUREK
Attorney General of Montana
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

FRANKIE SUE DEL PAPA
Attorney General of Nevada
198 South Carson Street
Carson City NV 89710
(702) 687-4488

DEBORAH T. PORITZ
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CN 080
Trenton NJ 08625
(609) 292-8567

THEODORE R. KULONGOSKI
Attorney General of Oregon
100 Justice Building
Salem OR 97310
(503) 378-4402

THOMAS W. CORBETT, JR.
*Attorney General of the
Commonwealth of Pennsylvania*
16th Fl., Strawberry Square
Harrisburg PA 17120
(717) 787-1100

QUESTION PRESENTED

Whether Congress intended, in enacting the Employee Retirement Income Security Act, to preempt states' traditional regulation of wages, apprenticeship and state-funded public works construction when expressed in a state prevailing wage law that permits contractors' payment of lower apprentice specific wages to apprentices duly registered in programs approved as meeting federal standards?

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43 PA. CONS. STAT § 90.3 (West 1995)	2
WASH. REV. CODE § 39.12.021 (1994)	2
WASH. REV. CODE § 49.04.010 (1994)	2
WASH. REV. CODE § 49.04.030 (1994)	4

I. INTEREST OF THE AMICI

Washington and the other named States submit this brief as *amici curiae* in support of petitioner, State of California, and urge this Court to grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment of that court in *Dillingham v. State of California*, 57 F.3d 712 (9th Cir. 1995). The amici States fall within the jurisdictional boundaries of several of the federal circuits. Because this brief is submitted on behalf of Washington, Delaware, Kentucky, Maryland, Massachusetts, Montana, Nevada, New Jersey, Oregon and the Commonwealth of Pennsylvania, by their attorneys general, consent to its filing is not required. SUP. CT. R. 37.5.

In 1937, Congress enacted the National Apprenticeship Act, 29 U.S.C. § 50 (Fitzgerald Act), for the "...purposes of protecting apprentices through the establishment of minimum labor standards, promoting apprenticeship as a system of training skilled workers and encouraging the federal government to cooperate with state agencies in formulating apprentice standards." *Joint Apprenticeship and Training Council of Local 363 v. New York State Dep't. of Labor*, 984 F.2d 589, 591 (2nd Cir. 1993) (citing 29 U.S.C. § 50-50b (1988 & Supp. III 1992) and statements of Representative Fitzgerald in the *Congressional Record*).

Federal regulations permit state agencies to apply to the United States Secretary of Labor for federal recognition as a State Apprenticeship Agency or Council ("SAC"). 29 C.F.R. § 29.12 (1992). If the state agency's standards and procedures are in conformity with federal standards, a SAC becomes federally approved and empowered to establish, for federal as well as state purposes, requirements for

apprenticeship programs as well as procedures by which to determine issues of registration. *Local 363 v. New York State Dept. of Labor*, 829 F.Supp 101, 103 (S.D.N.Y. 1993).

The amici states, as federally recognized SACs, are authorized to determine whether apprenticeship programs comply with state and federal standards pursuant to state law and the Fitzgerald Act. 29 U.S.C. §§ 50-50b (1988 & Supp. III 1992). The establishment of amici state apprenticeship programs predate the 1974 enactment of ERISA.¹ Furthermore, in at least Maryland and Washington, the prevailing wage provisions permitting the payment of lower apprentice specific wages to apprentices duly registered in approved programs, also predate the 1974 enactment of ERISA.²

The interests of several amici states are heightened because they are parties to litigation pending in other courts in which similar issues have been raised. Pennsylvania state officials are parties to a case presently pending in the Court of Appeals for the Third Circuit.³ The State of

¹ Delaware, DEL. CODE ANN., tit. 19, §§ 201-03 (Michie 1995) (enacted in 1963); Kentucky, KY. REV. STAT. ANN. § 343.020 (Baldwin 1995) (enacted in 1942); Maryland, MD. CODE ANN., LAB. & EMPL. ART., § 11-405 (Michie 1995) (enacted in 1957); Massachusetts, MASS. GEN. LAWS ANN. ch. 23 § 11E (West 1995) (enacted in 1941); Montana, MONT. CODE ANN. § 39-6-101 (1993) (enacted in 1941); Nevada, NEV. REV. STAT. § 53.610.020 (1993) (enacted in 1939); New Jersey, N.J. REV. STAT. ANN. § 34:1A-36 (West 1995) (enacted in 1953); Oregon, OR. REV. STAT. § 660.120 (1993) (enacted in 1955); Pennsylvania, 43 PA. CONS. STAT. § 90.3 (West 1995) (enacted in 1961); Washington, WASH. REV. CODE § 49.04.010 (1994) (enacted in 1941).

² WASH. REV. CODE § 39.12.021 (1994) (enacted in 1963); *Habron v. Epstein*, 412 F. Supp. 256, 258 (D.Md. 1976).

³ *Ferguson Electric Company, Inc. v. Foley, et al.*, Nos. 95-7454 and 95-7464.

Washington is a party to two cases presently before the Court of Appeals for the Ninth Circuit.⁴ Washington has encouraged the Court of Appeals for the Ninth Circuit to follow the analysis of *New York State Conference of Blue Cross & Blue Shield Plans, et. al. v. Travelers Insurance Company*, 514 U.S. ---, 115 S.Ct. 1671 (April 26, 1995) in finding no ERISA preemption where the purpose of state regulation is consistent with the purpose of any federal law at issue.

Review is necessary to protect and preserve the respective prevailing wage laws of the amici states represented herein and the long-standing cooperative state/federal effort in the formulation, promotion and enforcement of quality apprenticeship programs and standards. Cooperative state/federal regulation of apprenticeship is seriously undermined by application of the statutory analysis of ERISA provisions utilized by the Court of Appeals for the Ninth Circuit in *Dillingham*.

⁴ In *Inland Pacific Chapter of Associated General Contractors of America, v. Joseph A. Dear, Director, Dept. Labor & Industries of the State of Washington*, No. 93-36022, various contractor groups have challenged the Washington prevailing wage statute that requires payment of prevailing wages to employees in apprenticeship programs that had not received state approval but allows the payment of lower wages to employees participating in state approved programs. In *Inland Pacific Chapter of Associated Builders and Contractors of America, et.al. v. Joseph A. Dear, Director, Dept. Labor & Industries of the State of Washington the State, et.al*, Nos. 93-35568 and 93-35602, various contractor groups have challenged the authority of state regulations related to state approval of apprenticeship programs.

II. ARGUMENT

A. **The Ninth Circuit analysis severs the traditional state and federal relationship on apprenticeship matters, which historically preexisted the enactment of ERISA.**

The amici states, following the Fitzgerald Act's commitment to the welfare of apprentices and desire to foster cooperation with states, enacted complimentary state apprenticeship councils or programs which reflected the existence and the need to adopt or harmonize apprenticeship standards with the policies of the United States Department of Labor.⁵

If allowed to stand *Dillingham* will seriously undermine, if not eliminate, the state incentive to create and sustain quality apprenticeship programs that meet uniform quality standards of duration, curriculum, safety and supervision. Bona fide apprenticeship programs depend on public works to provide thousands of on-the-job training hours needed to produce a trained journey level employee. In *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), the Court of Appeals for the Ninth Circuit observed that in the building trades "[i]n order for such an apprenticeship program to work, it is essential that the employer be able to pay lesser wages to apprentices while they are in training. Prevailing wage statutes for public works thus present a significant

⁵ DEL. CODE ANN., tit. 19, §§ 201-03 (Michie 1995); KY. REV. STAT. ANN. § 343.020 (Baldwin 1995); MD. CODE ANN., LAB. & EMPL. ART., § 11-405 (Michie 1995); MASS. GEN. LAWS ANN. ch. 23 § 11G (West 1995); MONT. CODE ANN. § 39-6-101 (1993); NEV. REV. STAT. § 53.610.020 (1993); N.J. REV. STAT. ANN. § 34:1A-36 (West 1988); OR. REV. STAT. § 660.120 (1993); 43 PA. CONS. STAT § 90.1 (West 1995); WASH. REV. CODE § 49.04.030 (1994).

obstacle, unless apprenticeship programs are exempted." *Id.*, at 274.

The *Dillingham* decision will also provide an economic disincentive for contractors to devote resources to the provision of necessary, comprehensive apprenticeship agreements. No longer will a contractor have to demonstrate that an individual on a job site is actually in a bona fide apprenticeship program in order to receive a reduction in the prevailing wage rate. Mere classification of a laborer as an "apprentice" may suffice. States desiring completion of quality public works projects will likely react by removing the sub-journey wage rate all together.

- B. The decision in *Dillingham*, fails to adhere to, let alone acknowledge, the narrowing of ERISA's scope of preemption evidenced by the inquiry into Congressional intent in the recent *Travelers* case.

California's prevailing wage law, Cal. Lab. Code §1777.5, permits contractors to pay lower apprentice specific wages to apprentices duly registered in programs approved as meeting federal standards. *Dillingham*, however, held that the application of a state's prevailing wage law to allow payment of lower apprentice specific wages to apprentices duly registered in programs approved as meeting federal standards was preempted by ERISA. 57 F.3d at 715. The court assumed that the provision allowing a contractor to pay a lower apprentice specific wage "... has the effect, and possibly the aim of encouraging participation in state approved ERISA plans while discouraging participation in unapproved ERISA plans." *Id.*, at 719. This indirect effect was held sufficient to trigger ERISA preemption. *Id.*

The *Dillingham* decision is contrary to, and fails to recognize, this Court's recent holding that state laws which authorize an indirect source of administrative cost or result in an indirect source of merely economic influence on administrative decisions do not suffice to trigger ERISA preemption. *New York State Conference of Blue Cross & Blue Shield Plans, et. al. v. Travelers Insurance Company*, 514 US, at ___, 115 S.Ct. 1671, (1995). In *Travelers*, the Court acknowledged the dissonance created by finding ERISA preemption of preexisting state regulations. The Court noted that the decision of the Court of Appeals was "...an unsettling result and all the more startling because several States, including New York regulated hospital charges to one degree or another at the time ERISA was passed...(citations to state statutes omitted) ... [a]nd yet there is not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." *Id.*, at 1681.

The goal of Congress in enacting ERISA was to ensure the uniformity of employee benefit plans so "that employers would not face conflicting or inconsistent state and local regulation of employee benefits plans." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Neither California Labor Law §1777.5, or the authority to regulate apprenticeship in the amici states, does any harm to this goal.

Without review of the *Dillingham* decision, the Ninth Circuit will continue to disregard this judicial direction of statutory analysis and automatically find ERISA preempts state prevailing wage laws. The Petitioners' prediction that the Ninth Circuit will continue to follow the analysis set forth in *Dillingham* has become verity. On October 17, 1995, one month after it heard argument, the Ninth Circuit decided, in *ABC National Line*

Erection Apprenticeship Training Trust v. Aubry, Jr., 68 F.3d 343, 346 (9th Cir. 1995), that an Apprenticeship Training Trust fund, which was not "state approved" had standing to challenge California's prevailing wage laws and sub-journey wage rate provisions on the basis of preemption by ERISA. Reliance on the *Dillingham* result was unquestioned and reference to the *Travelers* decision was cursory. *Id.*, at 346-7.

C. Conflict Exists Within the Circuits On Whether Congress, Through the Enactment of ERISA, Intended To Preempt States' Traditional Regulation of Wages, Apprenticeship and State-funded Public Works Construction.

Petitioner has effectively identified the conflict between the Eighth Circuit decision in *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995) and the *Dillingham* decision. Only the *Minnesota Chapter ABC* decision recognizes the empowerment that flows to "both the Bureau (of Apprenticeship and Training) and approved state agencies or councils to approve apprenticeship programs for federal purposes." 47 F.3d at 980; 29 C.F.R. § 29.3 (1994). Unless the Supreme Court resolves the conflict, contractors, apprentices, and state and local public agencies in different states with similar state prevailing wage and apprenticeship laws will face uncertainty and conflicting directives concerning the use of apprentices on public works projects.

III. CONCLUSION

Amici Curiae respectfully request that this Court grant certiorari so that the method of statutory interpretation and the unintended consequences of the *Dillingham* decision are reviewed and ultimately avoided. Therefore, this Court should grant California's Petition for Writ of Certiorari.

DATED this 19th day of January, 1996.

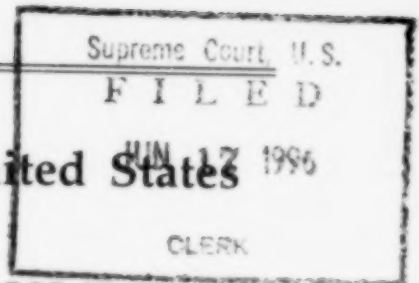
Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

LYNN D.W. HENDRICKSON
*JEFF B. KRAY
Assistant Attorneys General

*Counsel of Record
P.O. Box 40121
Olympia, Washington 98504-0121.
(360) 459-6571

In The
Supreme Court of the United States
October Term, 1995



STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS
ENFORCEMENT, DIVISION OF APPRENTICESHIP
STANDARDS, DEPARTMENT OF INDUSTRIAL
RELATIONS, COUNTY OF SONOMA,

v. *Petitioners,*

DILLINGHAM CONSTRUCTION, N.A., INC., MANUEL J.
ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The Ninth Circuit

JOINT APPENDIX

JOHN M. REA,
Chief Counsel,
(Counsel of Record)
VANESSA L. HOLTON,
Asst. Chief Counsel,
FRED D. LONSDALE, Sr.
Counsel,
JAMES D. FISHER, Counsel,
SARAH COHEN, Counsel,
State of California
Department of Industrial
Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 972-8900

*Counsel for State Petitioners
Department of Industrial Relations
Division of Apprenticeship Standards*

(Additional Counsel Listed On Inside Cover)

RICHARD N. HILL
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
650 California Street,
20th Floor
San Francisco, California
94108-2693
Telephone: (415) 433-1940
*Counsel for Respondents
Dillingham Construction, N.A.,
Inc., Manuel S. Arceo, dba
Sound Systems Media*

**Petition For Certiorari Filed November 16, 1995
Certiorari Granted April 15, 1996**

H. THOMAS CADELL, JR.,
Chief Counsel,
RAMON YUEN-GARCIA,
Counsel,

State of California
Division of Labor
Standards Enforcement
45 Fremont Street,
Suite 3220

San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 975-2060

*Counsel for State Petitioners
Division of Labor Standards
Enforcement and County
of Sonoma*

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To The Petition For Certiorari

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Judgment of the United States District Court for the Northern District of California, filed December 11, 1991	App. 23
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Opinion of the United States Court of Appeals for the Ninth Circuit, filed June 7, 1995	App. 1

Chronological List of Relevant Docket Entries

May 1, 1990, Plaintiff Dillingham's Complaint filed in U.S. District Court for the Northern District of California

May 17, 1990, Division of Labor Standards Enforcement's Answer to Complaint and Counterclaim filed.

May 17, 1990, Defendant County of Sonoma's Answer filed.

July 9, 1990, Division of Apprenticeship Standards' Answer filed.

November 14, 1990, Plaintiffs Dillingham's and Arceo's Motion for Summary Judgment filed.

November 14, 1990, Defendant Division of Labor Standards Enforcement's Motion for Summary Judgment filed.

November 14, 1990, Defendant County of Sonoma's motion to dismiss filed.

November 30, 1990, Plaintiff Dillingham's First Amended Complaint filed.

December 21, 1990, Division of Apprenticeship Standards' Answer to First Amended Complaint filed.

January 24, 1991, Defendant County of Sonoma's Answer to First Amended Complaint filed.

January 24, 1991, Defendant Division of Labor Standards Enforcement's Answer to First Amended Complaint filed.

December 11, 1991, Order entered granting Defendants' Motion for Summary Judgment.

December 11, 1991, Judgment entered in favor of Defendants and dismissing case.

January 15, 1992, Plaintiffs Dillingham's and Arceo's Notice of Appeal filed.

April 14, 1993, Argued and submitted to the Ninth Circuit Court of Appeals.

June 7, 1995, Opinion filed.

June 21, 1995, Defendants Petition for Rehearing with Suggestion for Rehearing en banc filed.

July 19, 1995 Order denying petition for rehearing filed.

RICHARD N. HILL
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
650 California Street, 20th Floor
San Francisco, CA 94108-2693
Telephone: (415) 433-1940
Attorneys for Plaintiffs
DILLINGHAM CONSTRUCTION N.A., INC. and
MANUEL J. ARCEO dba SOUND SYSTEMS MEDIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DILLINGHAM CONSTRUCTION	)	Case No.
N.A., INC., a California	)	C 90 1272 FMS
corporation, and MANUEL J.)	
ARCEO dba SOUND SYSTEMS	)	<u>COMPLAINT</u>
MEDIA,	)	<u>FOR</u>
Plaintiffs,	)	<u>DECLARATORY</u>
	)	<u>RELIEF; FOR</u>
v.	)	<u>VIOLATION OF</u>
COUNTY OF SONOMA;	)	<u>42 U.S.C. § 1983;</u>
DEPARTMENT OF INDUSTRIAL	)	<u>AND TO</u>
RELATIONS, DIVISION OF	)	<u>RECOVER</u>
LABOR STANDARDS	)	<u>MONIES</u>
ENFORCEMENT, an administrative	)	<u>ERRONEOUSLY</u>
agency of the State of California;	)	<u>WITHHELD</u>
THE DEPARTMENT OF	)	<u>PURSUANT TO</u>
INDUSTRIAL RELATIONS,	)	<u>CALIFORNIA</u>
DIVISION OF APPRENTICESHIP	)	<u>LABOR CODE</u>
STANDARDS, an administrative	)	<u>§ 1730</u>
agency of the State of California;	)	(Filed May 1,
and INTERNATIONAL	)	1990)
BROTHERHOOD OF ELECTRICAL)	
WORKERS, LOCAL 551,)	
Defendants.)	

Plaintiffs Dillingham Construction N.A., Inc. ("Dillingham Construction") and Manuel J. Arceo dba Sound Systems Media ("Sound Systems") complain as follows against all Defendants:

I

JURISDICTION AND VENUE

1. This Court has federal subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 2201 inasmuch as this is an action for declaratory relief involving federal questions. The federal questions involve the preemptive effect of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001, *et seq.*) and the National Labor Relations Act of 1935, as amended (29 U.S.C. § 151, *et seq.*) upon California's prevailing wage and apprenticeship statutes. Plaintiffs also allege a violation of 42 U.S.C. § 1983. The Court has jurisdiction over the Fourth Cause of Action under the principles of pendent jurisdiction.

2. Venue is proper in this district pursuant to 29 U.S.C. § 1132(e) and 28 U.S.C. § 1391 in that all Defendants reside or are found within the district and the illegal acts from which Plaintiffs' claims arise were committed and had effect within the district.

II

PARTIES

3. Plaintiff Dillingham Construction is a corporation duly organized under the laws of the State of Nevada and is authorized to do business in the State of California.

Dillingham is licensed as a contractor under the laws of the State of California. Dillingham Construction is an employer within the meaning of section 2(2) of the National Labor Relations Act (hereinafter the "NLRA") and section 1002(14) of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA").

4. Plaintiff Sound Systems is licensed as a contractor under the laws of the State of California and is engaged in the business of installing low voltage electrical systems. Sound Systems is an employer within the meaning of section 2(2) of the NLRA and section 1002(14) of ERISA.

5. Defendant County of Sonoma is a political subdivision of the State of California.

6. Defendant Department of Industrial Relations, Division of Labor Standards Enforcement is an administrative agency of the State of California and is charged with investigating and enforcing the State laws concerning, among other things, payment of prevailing wages for public works jobs.

7. Defendant Division of Apprenticeship Standards is an administrative agency of the State of California and is charged with regulating and approving apprenticeship plans according to California law, investigating complaints concerning the operation of apprenticeship plans and enforcing the terms of such plans, including but not limited to apprenticeship standards.

8. Defendant International Brotherhood of Electrical Workers, Local 551 (hereinafter referred to as "IBEW

Local 551") is an unincorporated organization which represents and acts for its members in bargaining with employers concerning wages, hours, working conditions and other terms and conditions of employment. IBEW Local 551 is a labor organization within the meaning of section 2(5) of the NLRA and section 1002(4) of ERISA.

III

GENERAL ALLEGATIONS

9. On or about April 15, 1987, Dillingham Construction was awarded a contract by the County of Sonoma for the construction of a new Main Adult Detention Facility in Santa Rosa, California (hereinafter referred to as the "Detention Facility").

10. On or about April 20, 1987, Dillingham subcontracted certain electrical work to Southern Steel Company, Inc., who in turn subcontracted portions of the work to Elenex, Inc.

11. On or about August 15, 1987, Elenex, Inc. subcontracted the electronic installation work at the Detention Facility to Sound Systems.

12. Sound Systems began performing work on the Detention Facility on or about January 1, 1988. Sound Systems is continuing to perform work at the Detention Facility at the request of the County of Sonoma.

13. The Detention Facility project was a public works project within the meaning of section 1720 of the California Labor Code. Accordingly, Sound Systems requested a determination by the County of Sonoma regarding the appropriate prevailing rates applicable to

all work performed on the Detention Facility project. On December 14, 1988, the Assistant Sonoma County Administrator determined that Sound Systems should comply with Determination C-422-X-1-88-1B pertaining to the craft of telephone installation worker and related classifications. A copy of the December 14, 1988 letter from the Assistant Sonoma County Administrator and Determination C-422-X-1-88-1B are attached hereto as Exhibit A. For all work performed on the Detention Facility project, Sound Systems paid its employees at or above the prevailing rates set forth in Determination C-422-X-1-88-1B.

14. When Sound Systems began work on the Detention Facility project, it was signatory to a collective bargaining agreement with IBEW Local 202. IBEW Local 202 is a labor organization within the meaning of section 2(5) of the NLRA. The collective bargaining agreement between Sound Systems and IBEW Local 202 included a scale of wages for apprentice electronic technicians and required Sound Systems to make contributions to the Northern California Sound and Communications Joint Apprenticeship Training Committee (hereinafter the "Northern California Sound and Communications J.A.T.C."). The Northern California Sound and Communications J.A.T.C. is an employee welfare benefit plan within the meaning of ERISA section 1002(1). Sound Systems complied with the terms of that collective bargaining agreement at all times prior to May 20, 1988.

15. On or about May 20, 1988, IBEW Local 202 withdrew its representation of the electronic technician employees of Sound Systems.

16. On or about June 1, 1988, Sound Systems entered into a new collective agreement with the National Electronic Systems Technicians Union (hereinafter referred to as "NESTU") covering its electronic technician employees. NESTU is a labor organization within the meaning of section 2(5) of the NLRA. The collective bargaining agreement between Sound Systems and NESTU contains a scale of wages for apprentice electronic technicians and requires Sound Systems to make contributions to the Electronic and Communications Systems Joint Apprenticeship and Training Trust ("Electronic and Communications Systems J.A.T.T."). The Electronic and Communications Systems J.A.T.T. is an employee welfare benefit plan within the meaning of ERISA section 1002(1). At all times subsequent to May 31, 1988, Sound Systems has complied with the terms of the NESTU collective bargaining agreement, including the apprentice wage scale and its obligation to make contributions to the Electronic and Communications Systems J.A.T.T.

17. Pursuant to California Labor Code section 1777.5, the Division of Apprenticeship Standards is authorized to approve apprenticeship training programs for apprentices employed on public works projects. On August 15, 1989, the Division of Apprenticeship Standards approved the Electronic and Communications Systems J.A.T.T. as an apprenticeship training program.

18. California Labor Code section 1777.5 provides in pertinent part as follows:

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or

subcontract, employees workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the Joint Apprenticeship Committee administering the apprenticeship standards of the craft or trade in the area of a site for the public work for certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected; provided, however, that the approval as established by the Joint Apprenticeship Committee or Committees shall be subject to the approval of the administrator of apprenticeship.

19. On or about March 14, 1989, Defendant IBEW Local 551 filed a complaint with Division of Apprenticeship Standards against Sound Systems. A true and correct copy of that complaint is attached hereto as Exhibit B. The complaint alleged violations of Labor Code section 1777.5 insofar as it claimed that Sound Systems failed to apply for a certificate to train apprentices and failed to make training fund contributions to the Northern California Sound and Communications J.A.T.C.

20. On or about April 11, 1989, the complaint against Sound Systems was withdrawn on the grounds that the work performed by Sound Systems did not fall under the jurisdiction of the Northern California Sound and Communications J.A.T.C. A true and correct copy of that determination is attached hereto as Exhibit C. Pursuant to this determination, Sound Systems continued to pay apprenticeship contributions to the Electronic and Communications Systems J.A.T.T.

21. On or about April 28, 1989, despite the withdrawal of the aforementioned complaint, Defendant Division of Apprenticeship Standards issued a notice of noncompliance to Plaintiffs asserting a failure by Sound Systems to request certification to train apprentices and a failure to make training fund contributions pursuant to Labor Code section 1777.5.

22. On or about October 20, 1989, Defendant Division of Labor Standards Enforcement issued a Notice To Withhold directing the County of Sonoma to withhold from Dillingham Construction the amount of \$45,103.37 based on the work performed by Sound Systems. This amount consisted of \$30,553.37 in wages allegedly owed and \$14,550.00 in penalties. Plaintiffs are informed and believe that the Notice To Withhold is based on Sound Systems' failure to make contributions to the Northern California Sound and Communications J.A.T.C. and its failure to pay journeyman wages to its apprentice electronic technicians.

FIRST CAUSE OF ACTION - ERISA PREEMPTION

23. Plaintiffs repeat and reallege paragraphs 3 through 22 above and incorporate by reference said paragraphs. This cause of action is for a declaration of Plaintiffs' rights under federal law pursuant to ERISA.

24. There is an actual controversy between Plaintiffs and Defendants concerning the authority of the Division of Apprenticeship Standards and the Division of Labor Standards Enforcement to require Sound Systems to participate in and comply with the terms of the Northern California Sound and Communications J.A.T.C. and to

require Sound Systems to make fringe benefit contributions to the Northern California Sound and Communications J.A.T.C. Specifically, there is an actual controversy between Plaintiffs and Defendants concerning whether application of section 1777.5 of the California Labor Code to Sound Systems is preempted by ERISA.

25. Section 514(a) of ERISA provides in pertinent part as follows:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

26. The Northern California Sound and Communication J.A.T.C. is an employee benefit plan within the meaning of 29 U.S.C. § 1002(1).

27. Application of California Labor Code section 1777.5 to Sound Systems is preempted by ERISA because it relates to an employee benefit plan within the meaning of ERISA. Specifically, any attempt by the Division of Apprenticeship Standards or the Department of Labor Standards Enforcement to force Sound Systems to participate in or make contributions to the Northern California Sound and Communications J.A.T.C. is preempted by ERISA section 514(a).

28. Accordingly, Plaintiffs request a declaration from the Court that Defendants may not attempt to enforce California Labor Code section 1777.5 against Plaintiffs so as to require Sound Systems to participate in

or make contributions to the Northern California Sound and Communications J.A.T.C.

SECOND CAUSE OF ACTION - NLRA PREEMPTION

29. Plaintiffs repeat and reallege paragraphs 3 through 28 above and incorporate by reference said paragraphs. This cause of action is for a declaration of Plaintiffs' rights under federal law pursuant to the NLRA.

30. There is an actual controversy between Plaintiffs and Defendants concerning the authority of the Division of Apprenticeship Standards and the Division of Labor Standards Enforcement to require Sound Systems to pay wages and fringe benefit contributions different than those set forth in its collective bargaining agreement with NESTU. Specifically, there is an actual controversy between Plaintiffs and Defendants concerning whether the application of California's prevailing wage statutes against Sound Systems is preempted by the NLRA.

31. The NLRA and principles of federal supremacy preempt the authority of the Division of Apprenticeship Standards and the Division of Labor Standards Enforcement to enforce California's prevailing wage statutes against Sound Systems so as to require Sound Systems to pay wages and benefits to its apprentice electronic technicians in excess of those set forth in its collective bargaining agreement with NESTU.

32. The NLRA and principles of federal supremacy preempt the authority of the Division of Apprenticeship Standards and the Division of Labor Standards Enforcement to enforce California Labor Code section 1777.5

against Sound Systems so as to require Sound Systems to pay training/apprenticeship contributions other than those set forth in its collective bargaining agreement with NESTU.

33. Accordingly, Plaintiffs request a declaration from the Court that Defendants may not attempt to enforce California's prevailing wage statutes, including Labor Code section 1777.5, against Sound Systems so as to require Sound Systems to pay wages and benefits, including training/apprenticeship contributions, other than those contained in its collective bargaining agreement with NESTU.

THIRD CAUSE OF ACTION - VIOLATION OF 42 U.S.C. § 1983

34. Plaintiffs repeat and reallege paragraphs 3 through 33 above and incorporate by reference said paragraphs. This cause of action is for violation of 42 U.S.C. § 1983.

35. Section 1983 provides in pertinent part that:

Every person who, under color of any statute, ordinance, regulation, customs, or usage of any state . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivations of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

36. One of the rights secured by section 1983 is the right of employers and labor organizations to be free of governmental interference in the collective bargaining

process. This right is granted by the NLRA and enforceable under section 1983.

37. Defendants Division of Apprentice Standards and Division of Labor Standards Enforcement have violated the right of Plaintiff Sound Systems to be free of governmental interference in the collective bargaining process by attempting to force Sound Systems to participate in and contribute to the Northern California Sound and Communications J.A.T.C. and by attempting to force Sound Systems to pay wages and fringe benefits in excess of those set forth in its collective bargaining agreement with NESTU.

38. Plaintiffs are entitled to recover compensatory damages, including attorney's fees, from Defendants Division of Apprenticeship Standards and Division of Labor Standards Enforcement in an amount according to proof.

FOURTH CAUSE OF ACTION - RECOVERY OF MONIES ERRONEOUSLY WITHHELD

39. Plaintiffs repeat and reallege paragraphs 3 through 38 above and incorporate by reference said paragraphs. This cause of action is to recover monies erroneously withheld pursuant to Labor Code section 1730, *et seq.*

40. Under California Labor Code section 1730 *et seq.*, when the Division of Labor Standards Enforcement orders an awarding body to withhold money from a contractor or subcontractor based on an alleged failure to pay the required prevailing rate, the contractor or subcontractor must bring suit against the awarding body

within 90 days after completion of the contract and formal acceptance of the job.

41. This complaint is timely because the County of Sonoma has claimed that the Detention Facility project has not yet been completed and thus there has been no formal acceptance of the job.

42. For the reasons set forth above in the first three causes of action, the Notice To Withhold issued by the Division of Labor Standards Enforcement to the County of Sonoma is invalid on the grounds that it is preempted by ERISA, preempted by the NLRA and is a violation of 42 U.S.C. § 1983.

43. In addition, Sound Systems was entitled to rely and did rely on the determination by the Assistant Sonoma County Administrator that Determination C-422-X-1-88-1B applied to all work performed by Sound Systems on the Detention Facility project. In the absence of clear error, bad faith or fraud, none of which are present in this case, the Division of Labor Standards Enforcement was required to accept the classification chosen by the County of Sonoma. This policy was announced by the State Labor Commissioner in Interpretive Bulletin 87-2, a copy of which is attached as Exhibit D.

44. Accordingly, Plaintiffs request that the Court order the Division of Labor Standards Enforcement to rescind the Notice To Withhold issued in Case No. 31-01303 and order the County of Sonoma to release to Dillingham the sum of \$45,103.37 withheld pursuant to that Notice To Withhold.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

1. That the Court enter a declaratory judgment that Defendants may not enforce California Labor Code section 1777.5 so as to require Sound Systems to participate in or make contributions to the Northern California Sound and Communications J.A.T.C.;
2. That the Court enter a declaratory judgment that Defendants may not enforce California's prevailing wage statutes, including Labor Code section 1777.5, so as to require Sound Systems to pay wages and fringe benefits, including training/apprenticeship contributions, different than those set forth in the collective bargaining agreement between Sound Systems and NESTU;
3. That Plaintiffs be awarded compensatory damages according to proof;
4. That the County of Sonoma be ordered to release to Dillingham Construction the sum of \$45,103.37 withheld pursuant to the Notice To Withhold in Case No. 31-01303;
5. That Plaintiffs be awarded their attorney's fees and costs of suit incurred in prosecuting this action; and
6. That Plaintiffs be awarded such other and further relief as the Court deems just and proper.

DATED: April 30, 1990.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF
& TICHY

A Professional Corporation

By: /s/ Richard N. Hill
RICHARD N. HILL

Attorneys for Plaintiffs
DILLINGHAM CONSTRUCTION
N.A., INC.
and MANUEL J. ARCEO dba
SOUND SYSTEMS MEDIA

EXHIBIT A

(Seal) OFFICE OF COUNTY ADMINISTRATOR

COUNTY OF SONOMA
575 Administration Drive - Room 104A
Santa Rosa, California 95403-2888
Telephone (707) 527-2431

Tom SCHOPFLIN
COUNTY ADMINISTRATOR

MIKE CHRYSTAL
ASST. COUNTY ADMINISTRATOR

December 14, 1988

Richard A. Clarey
Business Manager
International Brotherhood of
Electrical Workers
Local Union 551
1702 Corby Avenue
Santa Rosa, CA 95407

Re: Wage Determination - Electronics Technician

Dear Richard:

This is in response to your December 6 letter, requesting the established wage rate for work being performed by Sound Systems Media at the County's Main Adult Detention Facility project.

Based upon discussions with the Department of Labor representatives, the contractor and our construction manager, I have concluded that the established wage rate for electronic technicians would fit into the craft of telephone installation worker and related classifications. I have attached a copy of the latest wage determination on file in our Public Works Department for this classification.

The determination expired on July 31, 1988 and we have not yet received an update.

It is my further understanding that the electronic technician positions are distinguished from the inside wireman positions based upon high versus low voltage work. The established wage rate for the inside wireman would be the electrician rates per the prevailing wage rate determination which is also attached.

If I can be of any further assistance in this matter, please contact me.

Yours very truly,

/s/ Mike Chrystal
MIKE CHRYSTAL
Assistant County Administrator

MC: jt
cc: Dillingham Construction
Heery Program Management
attachment

GENERAL PREVAILING WAGE DETERMINATION
MADE BY THE DIRECTOR OF INDUSTRIAL
RELATIONS PURSUANT TO CALIFORNIA LABOR
CODE PART 7, CHAPTER 1, ARTICLE 2,
SECTIONS 1770, 1773 AND 1773.1

FOR COMMERCIAL BUILDING, HIGHWAY, HEAVY
CONSTRUCTION AND DREDGING PROJECTS
CRAFT: TELEPHONE INSTALLATION WORKER AND
RELATED CLASSIFICATIONS

DETERMINATION: C-422-X-1-88-1B

ISSUE DATE: JANUARY 19, 1988

EXPIRATION DATE OF DETERMINATION: JULY 31,
1988** THE RATE TO BE PAID FOR WORK PERFORMED
AFTER THIS DATE HAS BEEN DETERMINED. IF WORK
WILL EXTEND PAST THIS DATE, THE NEW RATE
MUST BE PAID AND SHOULD INCORPORATED IN
CONTRACTS ENTERED INTO NOW. CONTACT THE
DIVISION OF LABOR STATISTICS AND RESEARCH
FOR SPECIFIC RATES (415) 557-0561.

LOCALITY: ALL LOCALITIES WITHIN ALPINE, BUTTE,
CALAVERAS, COLUSA, EL DORADO, FRESNO,
GLENN, HUMBOLDT, KERN, KINGS, LAKE, LASSEN,
MADERA, MARIPOSA, MENDOCINO, MERCED,
MODOC, MONTEREY, NAPA, NEVADA, PLACER,
PLUMAS, SACRAMENTO, SAN BENITO, SAN JOA-
QUIN, SAN LUIS OBISPO, SANTA CRUZ, SHASTA,
SIERRA, SISKIYOU, SOLANO, SONOMA, STANISLAUS,
TEHAMA, TRINITY, TULARE, TUOLUMNE, YOLO,
AND YUBA COUNTIES

CRAFT/ CLASSI- FICATION	STEP b	BASIC HOURLY RATE	HEALTH AND WELFARE	EMPLOYER PAYMENTS			STRAIGHT-TIME HOURS	TOTAL HOURLY RATE	OVERTIME 1 1/2 d
				PENSION	VAC/HOL c	TRAINING			
TELE- PHONE INSTAL- LATION WORKER a	1	\$ 6.86	\$.93	\$.91	\$.47	-	8	\$ 9.17	\$12.60
	2	7.45	.93	.91	.52	-	8	9.81	13.54
	3	8.10	.93	.91	.72	-	8	10.66	14.71
	4	8.79	.93	.91	.78	-	8	11.41	15.81
	5	9.55	.93	.91	.84	-	8	12.23	17.01
	6	10.38	.93	.91	.92	-	8	13.14	18.33
	7	11.26	.93	.91	1.00	-	8	14.10	19.73
	8	12.24	.93	.91	1.08	-	8	15.16	21.28
	9	13.29	.93	.91	1.18	-	8	16.31	22.96
	10	14.44	.93	.91	1.28	-	8	17.56	24.78
	11	15.68	.93	.91	1.39	-	8	18.91	26.75

a INCLUDES TELEPHONE INSTALLING, PBX INSTALLING, AND SYSTEMS TECHNICIAN. DOES NOT APPLY TO THE INSTALLATION OF JUNCTION BOXES OR CONDUITS FOR LINE VOLTAGE WIRE OR TO THE PULLING, INSTALLATION, OR CONNECTION OF LINE VOLTAGE WIRE OR CABLES.

b THE TIME INTERVAL BETWEEN STEPS IS SIX MONTHS.

c RATES APPLY TO THE FIRST SIX YEARS OF EMPLOYMENT ONLY: FOR EMPLOYMENT OVER SEVEN YEARS, \$1.69 PER HOUR WORKED; FOR EMPLOYMENT OVER FIFTEEN YEARS, \$1.99 PER HOUR WORKED; FOR EMPLOYMENT OVER TWENTY-FIVE YEARS, \$2.29 PER HOUR WORKED.

d RATE APPLIES TO WORK IN EXCESS OF EIGHT HOURS DAILY AND FOR ALL HOURS OVER 40. RATE APPLIES TO ALL HOURS WORKED ON SUNDAY AND HOLIDAYS

RECOGNIZED HOLIDAYS: HOLIDAYS UPON WHICH THE GENERAL PREVAILING HOURLY WAGE RATE FOR HOLIDAY WORK SHALL BE PAID SHALL BE ALL LEGAL FEDERAL AND/OR STATE HOLIDAYS DETERMINED BY WAGE SURVEYS OR RECOGNIZED IN THE COLLECTIVE BARGAINING AGREEMENT, APPLICABLE TO THE PARTICULAR CRAFT, CLASSIFICATION, OR TYPE OF WORKER EMPLOYED ON THE PROJECT, WHICH IS ON FILE WITH THE DIRECTOR OF INDUSTRIAL RELATIONS.

TRAVEL AND SUBSISTENCE PAYMENTS: THE CONTRACTOR SHALL MAKE TRAVEL AND SUBSISTENCE

PAYMENTS TO EACH WORKER NEEDED TO EXECUTE THE WORK, AS SUCH TRAVEL AND SUBSISTENCE PAYMENTS ARE DEFINED IN THE APPLICABLE COLLECTIVE BARGAINING AGREEMENT FILED WITH THE DIRECTOR OF INDUSTRIAL RELATIONS IN ACCORDANCE WITH LABOR CODE SECTION 1773.8.

EXHIBIT B

Santa Clara County Electrical Joint Apprenticeship and Training Committee

908 Bern Court
San Jose, California 95112
(408) 977-1220
453-1022

[SEAL]

Labor
International Brotherhood
of Electrical Workers -
Local 332
1870 Stone Ave.
San Jose, CA 95125
(408) 294-4906

[SEAL]

Management
Santa Clara Valley
Chapter
National Electrical
Contractors Assn.
P.O. Box 28337
San Jose, CA 95159-8337
(408) 288-6100

December 27, 1988

Sheila Chase
Division of Apprenticeship Standards
100 Paseo de San Antonio
San Jose, CA 95113

Re: Complaint of Violations of Labor
Code Section 1777.5

Dear Sheila:

- 1) Charging Party:
International Brotherhood of Electrical
Workers, Local #551
1702 Corby Ave.,
Santa Rosa, CA 95407

- 1a) Charges being brought thru:
 Northern California Sound & Communications
 J.A.T.C.
 908 Bern Court
 San Jose, CA 95112
 Phone 408 977-1220
- 2) Respondent:
 Sound Systems Media, License #401856
 1495 Schaeffer Road
 Sebastopol, CA 95472
 Owner, Manuel J. Arceo
- 3) Project:
 New Sonoma County Jail
- 4) Awarding Agency:
 Sonoma County
- 5) Contact Person:
 Mr. Mike Crystal
 Assistant County Administrator
 575 Administration Drive
 Santa Rosa, CA 95403
 Phone 707-527-2431

X Did not apply for Certificate to train Apprentices

X No contributions to Training Fund

I declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

Sincerely,

/s/ James W. Evans
 James W. Evans
 Training Director

JWE:ap

Received
 Dec. 28, 1988

EXHIBIT C

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS [LOGO]

DIVISION OF APPRENTICESHIP STANDARDS

1111 Jackson Street, Room 4024

Oakland, CA 94607

Telephone (415) 464-1080

Received
 4-12-18

April 11, 1989

Mr. Manuel J. Arceo
 Sound Systems Media
 1494 Schaeffer Road
 Sebastopol, CA 95472

Dear Mr. Arceo:

Thank you for your prompt response in mailing the DAS 7 to the Northern California Sound and Communication JATC as I instructed you had to be done as a result of the complaint filed against your firm by that JATC for possible violation of Section 1777.5 of the State Labor Code.

Unfortunately, since that complaint was filed and since our meeting of March 23, 1989, the complaint has been withdrawn and, consequently, makes the DAS 7 you filed with that committee invalid.

My understanding of the matter is that that committee erred in filing the complaint, as they are claiming that the project you are working on does not come under the provisions of that committee.

As a result of their withdrawal letter, I am marking the complaint "Complaint Withdrawn," closing the case and returning the complaint to my Headquarters.

I would like to clarify another matter as I gave you some erroneous information when we met on the 23rd, and you should be aware of it if the same situation should arise in the future.

When I informed you that, as there were no contributions for training funds listed on the prevailing wage determination, and that you were not required to pay any training funds was incorrect. Attached is a copy of the Director's prevailing wage for Sonoma County. Please look on the back of the determination under "Notes." As you can see, training fund contributions are required if the apprenticeship committee in that area required a contribution in the apprenticeship standards.

Please accept my apologies for not giving you the correct information.

If you have any questions, please contact me at the above number.

Administration Representative

/s/ Frank Mendez
Frank Mendez
Senior Consultant
Oakland - District #06

Attachment

cc: Dillingham Construction
Mike Chrystal, Awarding Body

GENERAL PREVAILING WAGE DETERMINATION MADE BY THE DIRECTOR OF INDUSTRIAL RELATIONS
PURSUANT TO CALIFORNIA LABOR CODE PART 7, CHAPTER 1, ARTICLE 2, SECTIONS 1720, 1773 AND 1773.1
FOR COMMERCIAL BUILDING, HIGHWAY, HEAVY CONSTRUCTION AND MARINE PROJECTS

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR RELATIONS
OFFICE OF THE DIRECTOR
1400 MARKET STREET, SUITE 100
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 774-2000
FAX (415) 774-2001
WWW.DIR.CA.GOV

LOCALITY: SONOMA COUNTY
DETERMINATION: SON-89-1

CRAFT (JOURNEY LEVEL)	ISSUE DATE	EXPIRATION DATE	BASIC HOURLY RATE	EMPLOYER PAYMENTS		STRAIGHT-TIME		OVERTIME HOURLY RATE	
				HEALTH AND WELFARE	PENSION / VACATION / TRAINING AND/OR OTHER	TOTAL HOURLY RATE	DAILY	SATURDAY	SUNDAY AND HOLIDAY
BRICKLAYER, BLOCKLAYER, CAULKER, CLEANER, CORK-LAYER, STONEMASON, TUCK POINTER	08/22/88	06/30/89	A 92.05	3.00	5.60 B 3.32	0.13	7 32.10	43.405	54.87
BRICK TENDER	08/22/88	06/30/89	19.20	1.90	2.16 C	-	0 23.26	32.06	32.06
CARPET, LINOLEUM, RESILIENT TILE LAYER	02/22/89	07/31/89	A 19.92	2.07	2.95	0.29	0 26.05	47.97	47.97
Y WITHIN CARPET LAYERS CONFERENCE NO. 1	02/22/89	07/31/89	A 19.92	2.07	2.95	0.29	0 26.05	47.97	47.97
ELECTRICIAN: CORD & SYSTEM INSTALLER	02/22/89	09/30/89	16.73	1.04	F 6 1.00	-	0 17.36	24.94	24.94
CORN & SYSTEM TECH.	02/22/89	09/30/89	16.96	1.04	F 1 1.24	-	0 19.82	28.55	28.55
INSIDE WIREMAN	05/22/88	06/30/89	23.00	2.09	F 3.75	0.05	0 30.30	42.225	54.87
CABLE SPlicer	05/22/88	06/30/89	25.30	2.09	F 3.75	0.05	0 32.75	45.70	50.81
FIELD SURVEYOR:									
CHIEF OF PARTY (010.167-010) L	02/22/89	07/15/89	22.47	2.79	4.10	0.34	0 32.20	43.435	54.67
INSTRUMENTMAN (010.167-034) L	02/22/89	07/15/89	20.30	2.79	4.10	0.34	0 30.11	40.30	50.49
CHAINMAN/ROOMMAN (069.567-010) L	02/22/89	07/15/89	18.47	2.79	4.10	0.34	0 28.20	37.435	46.67
GLAZIER	08/22/87	06/30/89	A 21.55	2.43	3.90 C	0.30	0 28.26	39.035	49.81
MARBLE FINISHER	02/22/89	06/30/89	16.92	1.82	0.35	1.75	7 20.04	37.76	37.76
MARBLE SETTER	11/22/88	07/31/89	A 21.20	3.00	5.60	0.00	0 33.20	57.12	57.12
PAINTER - TAPER - BRUSH, POWER OR STEAM CLEANER, STEEL, PAPER-HANGER (FOR COMMERCIAL JOBS OVER 95 MILLION) P	05/22/88	12/31/88	A 19.42	2.10	2.12 0 1.20	0.04	0 24.90	43.97	43.97
SPRAY PAINTER, SAND BLASTER MATERIALBLASTER (FOR COMMERCIAL JOBS OVER 95 MILLION) P	05/22/88	12/31/88	A 23.20	2.10	2.12 0 1.20	0.04	0 28.76	40.225	51.69
SPRAY PAINTER, SAND BLASTER, MATERIALBLASTER (FOR COMMERCIAL JOBS UNDER 95 MILLION) P	05/22/88	12/31/88	A 19.92	2.10	2.12 0 1.20	0.04	0 25.40	35.185	44.97
PLASTER TENDER	11/22/88	06/30/89	10.40	3.00	3.76 C	0.26	0 120.50	46.90	46.90
PLASTER	08/22/88	06/30/89	19.19	1.90	2.16	-	0 23.25	32.045	42.44
PLUMBER: PLUMBER, STEAMFITTER REFRIGERATION FITTER (HVAC)	08/22/88	06/30/89	26.84	4.165	M 4.66	5 4.075	7 142.49	84.90	84.90
SERVICE AND REPAIR (HVAC) C) U	08/22/88	06/30/89	A 26.79	4.165	M 4.66	5 4.075	7 142.34	84.60	84.60
SPRINKLER FITTER (FIRE PROTECTION AND FIRE CONTROL SYSTEMS)	08/22/88	06/30/89	A 24.62	3.79	4.66	2.33	0 39.375	51.605	63.995
ROOFER: BITUMASTIC, ENAMELER, PIPE WRAPPER, COAL TAR PITCH BUILD-UP	11/22/88	07/31/89	29.745	2.05	5.60 C	0.30	0 37.695	52.57	67.44
NASTIC WORKER, KETTLEMAN	08/22/88	06/30/89	10.55	2.35	2.07	0.10	0 126.37	35.52	39.52
SHEET METAL WORKER & HVAC	11/22/88	06/30/89	A 27.62	2.43	Y 4.84	0.66	0 35.55	62.07	62.07
TILE FINISHER	08/22/87	02/28/89	16.17	1.03	1.40	0.03	0 21.13	30.82	30.91
TILE SETTER	05/22/88	06/30/89	21.63	2.50	1.84	0.15	0 28.03	39.445	50.46
WATER WELL DRILLER	02/22/89	01/31/90	13.17	1.60	0.30	-	0 15.63	22.215	22.215
PUMP INSTALLER	02/22/89	01/31/90	13.17	1.60	0.30	-	0 15.63	22.215	22.215
HELPER	02/22/89	01/31/90	9.10	1.60	0.30	-	0 11.42	15.97	15.97

SEE FOOTNOTES ON REVERSE

[These are Footnotes for reverse side of form]

GENERAL PREVAILING WAGE DETERMINATION
MADE BY THE DIRECTOR OF INDUSTRIAL
RELATIONS PURSUANT TO CALIFORNIA LABOR
CODE PART 7, CHAPTER 1, ARTICLE 2,
SECTIONS 1770, 1773 AND 1773.1

- * EFFECTIVE UNTIL SUPERSEDED BY NEW DETERMINATION ISSUED BY THE DIRECTOR OF INDUSTRIAL RELATIONS. CONTACT DIVISION OF LABOR STATISTICS AND RESEARCH ((415) 557-0561) FOR NEW RATES AFTER 10 DAYS FROM THE EXPIRATION DATE IF NO SUBSEQUENT DETERMINATION IS ISSUED.
 - ** THE RATE TO BE PAID FOR WORK PERFORMED AFTER THIS DATE HAS BEEN DETERMINED. IF WORK WILL EXTEND PAST THIS DATE, THE NEW RATE MUST BE PAID AND SHOULD BE INCORPORATED IN CONTRACTS ENTERED INTO NOW. CONTACT THE DIVISION OF LABOR STATISTICS AND RESEARCH FOR SPECIFIC RATES ((415) 557-0561).
 - S INDICATES AN APPRENTICEABLE CRAFT, RATES FOR APPRENTICES WILL BE FURNISHED ON REQUEST.
 - A THE BASIC HOURLY RATE AND EMPLOYER PAYMENTS ARE NOT TAKEN FROM A COLLECTIVE BARGAINING AGREEMENT FOR THIS CRAFT OR CLASSIFICATION.
-
- A INCLUDES AMOUNT WITHHELD FOR DUES CHECK OFF.
 - B RATE IS DOUBLED FOR EACH OVERTIME HOUR.
 - C INCLUDED IN STRAIGHT-TIME HOURLY RATE.

- D SATURDAYS IN THE SAME WORK WEEK MAY BE WORKED AT STRAIGHT-TIME IF JOB IS SHUT DOWN DURING THE NORMAL WORKWEEK DUE TO INCLEMENT WEATHER.
- E RATE APPLIES TO THE FIRST 2 OVERTIME HOURS; ALL OTHER TIME IS PAID AT THE SATURDAY OVERTIME HOURLY RATE.
- F IN ADDITION, AN AMOUNT EQUAL TO 3% OF THE HOURLY RATE IS ADDED TO DAILY AND OVERTIME HOURLY RATES FOR THE NATIONAL EMPLOYEES BENEFIT BOARD.
- G AFTER FIVE YEARS OF SERVICE \$1.36 PER HOUR.
- H RATE DOES NOT INCLUDE ANY APPLICABLE INCREASE IN VACATION/HOLIDAY PAYMENT.
- I AFTER FIVE YEARS OF SERVICE \$1.57 PER HOUR.
- J RATE APPLIES TO THE FIRST 2 DAILY OVERTIME HOURS AND THE FIRST 8 HOURS ON SATURDAY ONLY; ALL OTHER TIME IS PAID AT THE SUNDAY AND HOLIDAY OVERTIME HOURLY RATE.
- K FRIDAY IS A 4-HOUR WORKDAY.
- L DICTIONARY OF OCCUPATIONAL TITLES, FOURTH EDITION, 1977, U.S. DEPARTMENT OF LABOR.
- M CONTRIBUTION IS FACTORED AT THE APPLICABLE OVERTIME MULTIPLIER FOR EACH OVERTIME HOUR WORKED.
- N 8 HOURS DAILY, MONDAY THROUGH FRIDAY ON ALL JOBS LOCATED 90 MILES OR MORE FROM SAN FRANCISCO CITY HALL.
- O INCLUDES AN AMOUNT PER HOUR WORKED FOR BENEFICIAL FUND.

- P A SPECIAL PREVAILING WAGE DETERMINATION FOR REPAINT WORK MAY BE AVAILABLE. PLEASE CONTACT THE DIVISION OF LABOR STATISTICS AND RESEARCH 45 DAYS PRIOR TO BID ADVERTISEMENT FOR A RESPONSE.
- Q INCLUDES AN AMOUNT PER HOUR WORKED FOR SUPPLEMENTAL DUES.
- R RATE APPLIES TO THE FIRST 8 HOURS WORKED; ALL OTHER TIME IS PAID AT THE SUNDAY AND HOLIDAY OVERTIME HOURLY RATE.
- S INCLUDES 30.5¢ PER HOUR WORKED FOR TRAINING, 73¢ FOR SUPPLEMENTAL TRAINING, 20¢ FOR SUPPLEMENTAL UNEMPLOYMENT INSURANCE AND \$2.00 FOR SECURITY SAVINGS PLAN. THE WHOLE CONTRIBUTION AMOUNT IS DOUBLED FOR EACH OVERTIME HOUR WORKED.
- T INCLUDES 27.5¢ FOR TRAINING, 50¢ FOR SUPPLEMENTAL TRAINING, 20¢ FOR SUPPLEMENTAL UNEMPLOYMENT INSURANCE AND \$3.00 FOR SECURITY SAVINGS PLAN. THE WHOLE CONTRIBUTION AMOUNT IS DOUBLED FOR EACH OVERTIME HOUR WORKED.
- U DUTIES ARE LIMITED TO THE CLEANING, SERVICING, ADJUSTING, REPAIRING AND REPLACING OF MINOR PARTS, EQUIPMENT AND ADJUNCT ACCESSORIES ON PACKAGE HEATING AND AIR CONDITIONING EQUIPMENT.
- V INCLUDES 27.5¢ FOR TRAINING, 50¢ FOR SUPPLEMENTAL TRAINING, 20¢ FOR SUPPLEMENTAL UNEMPLOYMENT INSURANCE AND \$3.00 FOR SECURITY SAVINGS PLAN.
- W RATE APPLIES TO THE FIRST 2 OVERTIME HOURS ONLY; ALL OTHER TIME IS PAID AT THE

SUNDAY AND HOLIDAY OVERTIME HOURLY RATE.

- X SATURDAY MAY BE PAID AT STRAIGHT TIME IF THE WORK WEEK IS TUESDAY THROUGH SATURDAY.
- Y INCLUDES AN AMOUNT PER ___ HOUR WORKED FOR COLA FUND.
- Z INCLUDES 18¢ PER HOUR FOR SUPPLEMENTAL UNEMPLOYMENT BENEFITS.
- AA IN ADDITION, AN AMOUNT EQUAL TO 10% OF THE HOURLY RATE IS ADDED TO THE DAILY AND OVERTIME HOURLY RATE FOR VACATION/HOLIDAY FUND.
- BB RATE APPLIES TO THE FIRST TWO YEARS OF EMPLOYMENT ONLY: \$1.10 AFTER 2 YEARS; \$1.21 AFTER 5 YEARS; \$1.36 AFTER TEN YEARS.
- CC COMPUTATION IS BASED ON THE LOWEST VACATION AMOUNT. THESE RATES SHOULD BE INCREASED BY ANY ADDITIONAL VACATION/HOLIDAY PAY THAT IS REQUIRED.
- DD RATE APPLIES TO THE FIRST TWO YEARS OF EMPLOYMENT ONLY: 97¢ AFTER FIVE YEARS; \$1.14 AFTER TEN YEARS.

NOTE: TRAINING AND TRUST FUND CONTRIBUTIONS FOR CRAFTS AND CLASSIFICATIONS IN APPRENTICEABLE OCCUPATIONS ARE REQUIRED TO BE MADE IN ACCORDANCE WITH THE APPROPRIATE JOINT APPRENTICESHIP TRAINING STANDARDS SET FORTH IN LABOR CODE SECTION 1777.5. IF THE APPROPRIATE RATES ARE NOT SPECIFIED BY A DETERMINATION, THEY MAY BE ASCERTAINED BY CONTACTING THE APPROPRIATE

JOINT APPRENTICESHIP TRAINING COMMITTEE OR THE LOCAL OFFICE OF THE DIVISION OF APPRENTICESHIP STANDARDS.

RECOGNIZED HOLIDAYS: HOLIDAYS UPON WHICH THE GENERAL PREVAILING HOURLY WAGE RATE FOR HOLIDAY WORK SHALL BE PAID, SHALL BE ALL HOLIDAYS DETERMINED BY WAGE SURVEYS OR RECOGNIZED IN THE COLLECTIVE BARGAINING AGREEMENT, APPLICABLE TO THE PARTICULAR CRAFT, CLASSIFICATION, OR TYPE OF WORKER EMPLOYED ON THE PROJECT, WHICH IS ON FILE WITH THE DIRECTOR OF INDUSTRIAL RELATIONS.

TRAVEL AND SUBSISTENCE PAYMENTS: THE CONTRACTOR SHALL MAKE TRAVEL AND SUBSISTENCE PAYMENTS TO EACH WORKER NEEDED TO EXECUTE THE WORK, AS SUCH TRAVEL AND SUBSISTENCE PAYMENTS ARE DEFINED IN THE APPLICABLE COLLECTIVE BARGAINING AGREEMENT FILED WITH THE DIRECTOR OF INDUSTRIAL RELATIONS IN ACCORDANCE WITH LABOR CODE SECTION 1773.8.

EXHIBIT D

State of California

MEMORANDUM

To: All Professional Staff

Date April 6, 1987

Subject Interpretive Bulletin
No. 87-2Auditing Contractors Using
Erroneous or Doubtful
Classifications and Wage
Rates on Public Works
Projects

From: Department of Industrial Relations

Division of Labor Standards Enforcement
Lloyd W. Aubry, Jr.
State Labor Commissioner

It has been and continues to be the Division's policy that it is the responsibility of the awarding bodies, and not the Division, under Labor Code Section 1773.2 to determine the appropriate classifications and wage rates on public works projects. The Division recognizes that many awarding bodies are not aware of or do not accept this responsibility and leave such determinations to the contractor. The Division also recognizes that many of these classification and wage rate issues are difficult and that it is not appropriate for the Division to adjudicate jurisdictional disputes in such cases when other forums, especially created or constituted for this purpose, exist.

Accordingly, in order to provide guidance to deputies enforcing the prevailing wage laws when they learn

of the possible misuse of a classification or wage rate, the following enforcement policy shall be in effect:

In cases where it is contended that inappropriate classifications or wage rates are being used, an audit or determination which alters the chosen classification or wage rate will be effected only in cases of clear error, bad faith or fraud. When such contentions are made, the investigating deputy should seek from the party making the contention specific evidence to support the claim. In all other cases, the classification chosen by the awarding body or contractor shall be respected.

Any questions on implementation of this policy are to be referred to your Senior Deputy or Regional Manager who may seek guidance from the Division of Labor Statistics and Research, if appropriate.

/s/ Lloyd Aubry, Jr.

John M. Rea, Chief Counsel
 Vera Winter Lee, Counsel
 Department of Industrial Relations
 400 Oyster Point Blvd., Wing C, Suite 504
 So. San Francisco, CA 94080
 Tel. (415) 737-2900

Attorneys for Defendant
 Department of Industrial Relations
 Division of Apprenticeship Standards

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

DILLINGHAM CONSTRUCTION, N.A.,)
 INC., a California corporation,) CASE NO. C 90
 and MANUEL J. ARCEO dba) 1272 FMS
 SOUND SYSTEMS MEDIA,)
 Plaintiffs,)

v.)
 COUNTY OF SONOMA; DEPARTMENT)
 OF INDUSTRIAL RELATIONS,)
 DIVISION OF LABOR STANDARDS)
 ENFORCEMENT, an administrative)
 agency of the State of California; et al.,)
 Defendants.)
)

DIVISION OF LABOR STANDARDS)
 ENFORCEMENT, Department of)
 Industrial Relations, State of California)
 Defendant/Third Party Plaintiff,)
)

v.)
 REVY KIM DEARING, individually;)
 REVY KIM DEARING dba)
 WATERPROOFING UNLIMITED, et al)
 Third Party Defendants.)

DECLARATION
 OF
 GAIL JESSWEIN

(Filed
 Nov. 14, 1990)

I, Gail W. Jesswein, declares:

1. I am Chief of the Division of Apprenticeship Standards, California Department of Industrial Relations. I am also secretary of the California Apprenticeship Council ("CAC") by virtue of Labor Code §3073.

2. My duties as Chief of DAS include Administering the apprenticeship laws of the State of California contained in the Labor Code, and the California Administrative Code, Title 8, Division 2, and working in cooperation with the Bureau of Apprenticeship Training of the U.S. Dept. of Labor ("DOL/BAT") in carrying out the provisions of the Fitzgerald Act. I am a member of the DAS/BAT state coordination committee, established by the DAS/BAT cooperative working agreement.

3. The California Apprenticeship Council of the Division of Apprenticeship Standards is approved by the Bureau of Apprenticeship Training of the U.S. Department of Labor as the state body authorized to carry out registration and approval of local apprenticeship programs and agreements for federal purposes within the state. In California, the Chief of DAS has authority to approve or disapprove apprenticeship programs. The approval decision of the Chief automatically becomes an order of the CAC if not appealed to the CAC within 30 days. (See CCR §212.2(e).

4. In my capacity as Chief of DAS and Secretary of CAC, I am custodian of all records relating to the administration of Apprenticeship laws in California. Attached hereto and incorporated herein as Exhibit A is a true and correct copy of the letter of 2-13-78 from the DOL/BAT to Chief of DAS approving the CAC as the body to register

apprenticeship programs and agreements for federal purposes. The letter has been maintained in the files of the DAS since it was received.

5. The DAS sought continued recognition of the CAC by the DOL/BAT for federal purposes in May of 1977. The DAS requested recognition by submitting to the DOL/BAT copies of the California apprenticeship law and regulations, the California Plan for Equal Opportunity in Apprenticeship, and a "checklist" setting forth the state compliance with the Fitzgerald Act and regulations under 29 CFR Part 29. Attached hereto and incorporated herein as Exhibit B are true and correct copies of the letter dated 5-25-77 from the DAS Chief to the DOL/BAT, and the attached "29 CFR Checklist." The letter and checklist have been maintained in the files of the DAS since they were sent to DOL/BAT.

6. As part of the process of gaining recognition for the CAC as a state approved council by the by [sic] DOL/BAT, the DOL/BAT conducted a review of California law and regulations to determine if they complied with Title 29 of the Code of Federal Regulations Part 29. As a result of the review, the DOL/BAT informed DAS that certain items appeared to be deficient. Attached hereto and incorporated herein as Exhibit C is a true and correct copy of the October 6, 1977 letter from DOL/BAT to the Chief of DAS and the attached "Checklist" regarding DOL/BAT's review of California law and regulations. The letter and checklist have been maintained in the files of the DAS since they were received.

7. DAS responded to the DOL/BAT's letter of 10-6-77 by letter dated 12-16-77. The letter provided

additional data relating to state apprenticeship procedures for consideration by DOL/BAT in ruling on approval of the CAC. A true and correct copy of the DAS' letter of 12-16-77 to the DOL/BAT is attached hereto and incorporated herein as Exhibit D. The letter has been maintained in DAS files since it was sent to DOL/BAT.

8. The DOL/BAT conducts periodic reviews of California apprenticeship laws and regulations under 29 CFR Parts 29 and 30. The most recent state compliance review of its operations was conducted on August 13, 1990 at DAS Headquarters. Attached hereto and incorporated herein as Exhibit E are true and correct copies sent to DAS from DOL/BAT of the attached "SAC Review Checklist" and "Management Review of SAC Operations" documents. The attached documents have been maintained in DAS files since they were received from DOL/BAT.

I attended the state compliance review meeting with the Regional Director and State Director of DOL/BAT on August 13, 1990. During our meeting we discussed each and every item contained in the "SAC Review Checklist" and the "Management Review of SAC Operations." We discussed the state apprenticeship laws and regulations and the manner in which they conform to 29 CFR Parts 29 and 30.

9. DAS and DOL/BAT entered into agreement on 2-24-86, supplanting an earlier agreement, governing the procedures to cooperatively carry out the provision of the Fitzgerald Act, 29 CFR Parts 29 and 30, the California Apprenticeship Law (Shelly-Maloney Apprentice Labor Standards Act of 1939), and the California Administrative

Code, Title 8, Chapter 2. A true and correct copy of the "State of California Cooperative Working Agreement for the Division of Apprenticeship Standards and Bureau of Apprenticeship and Training" dated 2-24-86 is attached hereto and incorporated herein as Exhibit F. My signature appears on Page 9 of the Agreement on behalf of the Division of Apprenticeship Standards. The present Agreement has not been modified or terminated since its execution and is still in effect at this time.

10. As Chief of the DAS, I have responsibility under Title 8 of the California Administrative Code §212 to approve written apprenticeship standards. In determining whether to approve written standards, I determine whether the standards contain the substantive provisions required by §212 of Title 8 of the California Administrative Code.

When apprenticeship standards are submitted for approval and where approval would result in establishment of a second apprenticeship program for the same geographical area and occupation, I am authorized under §212.2 to approve such standards if they meet the requirements of §212 and if approval would not lower or adversely affect existing prevailing conditions and training standards. Approval for a "second" apprenticeship program in a given occupation and geographical area is permitted when the apprenticeship training needs are justified. Approval has been given for additional apprenticeship programs that include electrical, machinists, stationary engineers, carpenters, cement mason, painter and plumber committees in areas where operating programs presently exist.

11. The California Apprenticeship Council has adopted a "State of California Plan for Equal Opportunity In Apprenticeship" which is an appendix to 8 California Administrative Code §215. The present plan was first adopted on July 30, 1971 to conform to 29 CFR Part 30 and has been amended several times. The present plan supplanted an earlier California plan that did not meet the 29 CFR Part 30 criteria.

The U.S. Department of Labor, Bureau of Apprenticeship and Training has approved for federal purposes the Plan and amendments up through the amendment which became effective on November 28, 1983.

The Plan underwent minor non-substantive amendments effective September 28, 1986.

12. Effective August 15, 1989, I approved the Apprenticeship Standards and Selection Procedures for the Electronic and Communication Systems Joint Apprenticeship Committee for the occupation of Electronic and Communications Systems Technician.

13. By letter of approval dated August 15, 1989, I advised Dale L. Kirkland, Executive Director, Electronic and Communications Systems Joint Apprenticeship and Training Committee, that his JAC should limit its apprenticeship activities to preliminary functions only until the approval becomes an order of the council. Only when this approval became a final order would it allow his JAC to pay lower wages to apprentices than journeymen. See Labor Code §§3077 and 1777.5.

14. In my letter of approval to Kirkland, I quoted Cal Code of Regulations, Title 8, §212.2(b) as follows:

" . . . the decision of the Chief DAS regarding approval or disapproval of apprenticeship program standards shall become an Order of the California Apprenticeship Council unless an appeal as provided by subdivision (c) of this section is filed, . . . " Section 212.2(c) states " . . . the sponsor(s) of an existing program(s) may file an appeal of the decision of the Chief DAS with the California Apprenticeship Council . . . " " . . . The Chief DAS's decision shall be the order of the Council if no appeal is filed within 30 days of the receipt of the decision by the parties . . . "

My approval would not be final until any appeal had been decided by the Council.

15. The existing program sponsor, Northern California and Northern Nevada Sound and Communication Joint Apprenticeship and Training Committee did file a timely appeal, thereby suspending my approval. The California Apprenticeship Council hearing panel issued a Proposed Decision recommending that my decision be sustained and adopted. Effective October 26, 1990 the California Apprenticeship Council approved the Proposed Decision of its hearing panel. (See attached copy.)

16. Under Labor Code §3084, and 8 CCR §212.2, any party aggrieved by this decision, including one aggrieved by lack of retroactivity, has until December 5 to file a writ in Superior Court. As of this date I have received no notice of any writ.

17. The foregoing statements are true of my own personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at South San Francisco, California.

Dated: 11-9-90 /s/ Gail W. Jesswein
Gail W. Jesswein, Chief
Division of Apprenticeship
Standards

EXHIBIT A

U.S. DEPARTMENT OF LABOR

Employment And Training Administration

Washington, D.C. 20213

(LOGO)

February 13, 1978

Mr. Edward W. Wallace
Chief, Division of Apprenticeship
Standards
Department of Industrial
Relations - Room 3230
455 Golden Gate Avenue
San Francisco, California 94102

Dear Ed:

By authorization of the Secretary of Labor and in accordance with the provisions of Title 29 CFR Part 29.12, I am pleased to grant recognition, effective this date, to the State of California Apprenticeship Council as the appropriate body for State registration and/or approval of local

apprenticeship programs and agreements for Federal purposes.

The amendment to the Administrative Code and other documents submitted correct the deficiencies as recorded in my letter of October 6, 1977. I am particularly pleased that we can and will work together in partnership, under the conditions of Title 29 CFR Part 29, to formulate and promote labor standards that will protect the apprentice and for the skilled work force necessary for the welfare of the State of California and the Nation.

Sincerely,

/s/ Hugh C. Murphy
HUGH C. MURPHY
Administrator
Bureau of Apprenticeship
and Training

EXHIBIT B

State of California - Agriculture and Services Agency
EDMUND G. BROWN, JR. Governor

Department of Industrial Relations
DIVISION OF APPRENTICESHIP STANDARDS
455 Golden Gate Avenue
San Francisco 94102

ADDRESS REPLY TO:
P.O. BOX 603
SAN FRANCISCO CA 94101

May 25, 1977

Mr. Morris E. Skinner, Regional Director
Bureau of Apprenticeship & Training
U. S. Department of Labor
450 Golden Gate Avenue
San Francisco, CA 94102

Dear Mr. Skinner:

The Division of Apprenticeship Standards, on behalf of the California Apprenticeship Council, has reviewed Section 29.12 of 29CFR, Part 29, dated February 18, 1977, to determine if we comply with each element of the approval criteria for the Secretary's recognition of the California Apprenticeship Council. Our review is reflected on the *29CFR Checklist*.

We find that our existing law regulations fulfill the requirements for recognition with one exception - there are no provisions for reciprocity between the Council and other state apprenticeship agencies.

The California Apprenticeship Council has proposed a new section to be added to the Council's rules and regulations. The new section would read:

Proposed amendment to Title 8, Chapter 2, Part 1

Sec. 206 (a) The purpose and intent, etc. (no change)

Add (b) Apprenticeship programs and standards of employers and unions in other than the building and construction industry, which jointly form a sponsoring entity on a multistate basis and are registered pursuant to all requirements of Title 29 Code of Federal Regulations, Part 29, as adopted February 15, 1977, by any recognized State Apprenticeship Agency/Council or by the Bureau of Apprenticeship and Training, U. S. Department of Labor, shall be accorded approval reciprocity by the Administrator of Apprenticeship, if such reciprocity is requested by the sponsoring entity.

We feel that the addition to the Council's rules and regulations will complete the requirements for recognition.

The California Apprenticeship Council must comply with the California Government Code when it promulgates regulations. The Government Code requires a specified period of time prior to adoption of regulations to consider any arguments at a public hearing and for regulations to be filed with the Secretary of State. A period of over 60 days is necessary to complete the adoption of new regulations and have them become effective.

It is not possible for the Council to promulgate the necessary regulation in time to meet the July 18, 1977, deadline to submit the application for recognition of the California Apprenticeship Council. We, therefore, request an interim

approval with an extension requested to allow the Council sufficient time to include the section regarding reciprocity in its rules and regulations. The new section should become effective early in September, 1977.

Supporting documents enclosed include:

- 1) The Shelley-Maloney Apprentice Labor Standards Act of 1939
- 2) California Administrative Code, Title 8, Chapter 2
- 3) California Plan for Equal Opportunity in Apprenticeship
- 4) 29CFR Checklist

Sincerely,

Edward W. Wallace, Chief
(415) 557-1700

EWV:CDR:ds
Encls.

CALIFORNIA APPRENTICESHIP COUNCIL

29 CFR Checklist

INTRODUCTION. This brief checklist is designed for use by individuals responsible for the preparation of State recognition packages to ensure that all necessary items are included in the package. The checklist will also assist Federal staff responsible for determining the adequacy and acceptability of the State submissions.

State Apprenticeship Law and Regulations

References: 29.12(a)(1); 29.12(b)(1)

A. Is there evidence of an acceptable state Apprenticeship Law (or Executive Order)?

Yes No

X —

1. Is the apprenticeship agency established in:

- the State department of Labor
- another State agency having appropriate jurisdiction over laws and regulations governing wages, hours, working conditions?

X —

If yes, name the Agency:
Department of Industrial Relations

X —

2. Does the law (or regulations) state that the following are the characteristics of apprenticeship occupation:

- it is customarily learned in a practical way through a structured, systematic program of on-the-job supervised training (29.4(a))
- it is clearly identified and commonly recognized throughout an industry.
- it involves manual, mechanical or technical skills and knowledge which require a minimum of 2,000 hours of on-the-job work experience.

X —

X —

X —

- it requires related instruction to supplement the on-the-job training.

X —

B. Are there regulations adopted to implement the law (or Executive Order)?

X —

- If yes, what is the effective date of the regulations? Adopted 1940

II. State Apprenticeship Council

References: 29.12(a)2; 29.12(b)(2), (b)(3), (b)4)

A. Is the composition of the State Apprenticeship Agency/Council acceptable?

X —

1. Is there evidence that members are familiar with apprenticeship occupations?

X —

2. What is the composition and voting privilege of the council?

Number
of Voting
Members

- Management

Representatives

6 6

- Labor Representatives

6 6

- Public Representatives

2 2

- Education Representatives

2 2

- Other (specify):

Director of Industrial Relations

1 1

— —

== ==

Total Representatives

17 17

	<u>Yes</u>	<u>No</u>
3. Are there ex-officio members on the Agency Council?	<u>X</u>	—
4. Are ex-officio members also regular voting members?	<u>X</u>	—
— If not, are there established practices and procedures for ex-offices voting privileges under exceptional circumstances?	—	—
B. Are the powers and duties of the Council clearly delineated?	<u>X</u>	—
C. Are the powers and duties of the State Official for apprenticeship clearly delineated?	<u>X</u>	—
— Is the State Official a member of the State Agency/Council?	<u>X</u>	—
D. Is the Agency/Council or State Official clearly (authorized) to register and deregister apprenticeship programs and agreements?	<u>X</u>	—
— If yes, specify who is authorized: <u>Administrator of Apprenticeship</u>		
E. Is the procedure for registration and deregistration described?	<u>X</u>	—
III. <u>State Plan for Equal Employment Opportunity in Apprenticeship</u>		
References: 29.12(a)(3); 29.12(b)(5); 29 CFR Part 30 as amended		
A. Is there evidence of an acceptable State Plan for EEO in Apprenticeship?	<u>X</u>	—
— Is the equal opportunity pledge (30.3(b)) included in the submission?	<u>X</u>	—

B. Do the State provisions establish policies and procedures to promote EEO in apprenticeship programs pursuant to the State plan?	<u>X</u>	—
C. Do the State provisions require apprenticeship programs to operate in conformity with the State Plan?	<u>X</u>	—
IV. <u>Basic Standards, Criteria, and Requirements for Program Registration</u>		
Reference: 12.12(a)(4); 12.12(b)(6), (b)(7)		
A. Does the description of the basic standards for registration/approval of apprenticeship programs comply with 29.5?	<u>X</u>	—
1. Does the program description incorporate the terms and conditions of employment, training and supervision of one or more apprentices in the apprenticeship occupation?	<u>X</u>	—
— Are there provisions for all sponsors of apprentice training programs to comply with the terms and conditions set forth in the program description?	<u>X</u>	—
2. Does the program description include the equal opportunity pledge prescribed in 29 CFR 30.3(b)?	<u>X</u>	—

- When applicable, does the description call for the documentation of an affirmative action plan in accordance with 29 CFR 30.4, a selection method authorized in 29 CFR 30.5 (selection on the basis of rank from a pool of eligible applicants, random selection from a pool of eligible applicants, selection from a pool of current employees, or an alternative method); or similar requirements expressed in a State Plan for EEO in Apprenticeship and approved by the Department? X —
- 3. Does the program description include provisions regarding:
 - the employment and training of the apprentice in a skilled trade? X —
 - a term of apprenticeship which is not less than 2,000 hours of work experience and is consistent with training requirements established by industry practice? X —
 - an outline of the work processes in which the apprentice will receive supervised work experience and on-the-job training? X —

- the allocation of approximate time to be spent in each major work process outlined above? X —
- a minimum of 144 hours annually for organized, related and supplemental instruction in technical subjects related to the trade? X —
- a means of approving organized, related and supplemental instruction? X —
- documentation of a progressively increasing schedule of wages to be paid the apprentice consistent with the skill acquired? X —
- periodic review and evaluation of the apprentice's progress in job performance and related instruction? X —
- maintenance of appropriate apprentice progress records? X —
- a specific numeric ratio language of apprentices to journeymen consistent with proper supervision, training safety and continuity of employment in terms of job site, work force, department or plant? X —
- a probationary period reasonable in relation to full apprenticeship term (with full credit given for such period toward completion of apprenticeship? X —

- adequate and safe equipment and facilities for supervision, and safety training for apprentices on the job and in related instruction? X —
- minimum qualifications required by a sponsor for persons entering the apprenticeship program (with an eligible age starting at not less than 16 years)? X —
- placement of an apprentice under a written apprenticeship agreement as required by the State apprenticeship law and regulation, or the Bureau where no such State law or regulation exists? X —
- does the agreement directly or by reference, contain the standards of the program as part of the agreement? X —
- the granting of advanced standing or credit for previously acquired experience, training or skills for all applicants equally, with commensurate wages for any progression step so granted? X —
- transfer of employer's training obligation when the employer is unable to fulfill

- his obligation under the apprenticeship agreement to another employer under the same program with the consent of the apprentice and apprenticeship committee or sponsor? X —
- assurance of qualified training personnel and adequate supervision on the job? X —
 - recognition for successful completion of apprenticeship evidenced by an appropriate certificate? X —
 - identification of the registration agency? X —
 - provision for the registration, cancellation and deregistration of the program? X —
 - the prompt submission of any modification or amendment to the program? X —
 - the registration of apprenticeship agreements, modifications and amendments? X —
 - notice to the registration office of persons who have successfully completed apprenticeship programs? X —
 - notice of cancellations, suspensions and terminations of apprenticeship agreements and causes therefore? X —

- authority for the termination of an apprenticeship agreement during the probationary period by either party without stated cause? X —
 - a statement that the program will be conducted operated and administered in conformity with the applicable provisions of 29 CFR Part 30, as amended, or a State EEO in apprenticeship plan approved by the Department? X —
 - the name and address of the appropriate authority under the program to receive, process and make disposition of complaints? X —
 - the recording and maintenance of all records concerning apprenticeship as required by the Bureau or recognized State Apprenticeship agency and other applicable law? X —
4. Does the description of the apprenticeship agreement contain:
- names and signatures of the contracting parties (apprentice, sponsor or employer) and parent or guardian if the apprentice is a minor? X —

- date of birth of the apprentice? X —
- name and address of the program sponsor and registration agency? X —
- a statement of the trade or craft in which the apprentice is to be trained? X —
- the beginning date and term (duration) of apprenticeship? X —
- a statement showing the number of hours to be spent by the apprentice in work on the job? X —
- a statement showing the number of hours to be spent in related and supplemental instruction (recommended not to be less than 144 hours per year)? X —
- a statement setting forth a schedule of work processes in the trade or industry divisions in which the apprentice is to be trained and the approximate time to be spent at each process? X —
- a statement of the graduated scale of wages to be paid the apprentice and whether or not required school time will be compensated? X —

- a statement providing for a specific period of probation during which the apprenticeship agreement may be terminated by either contracting party upon written notice to the registration agency? X
- a statement providing, after the probationary period, the agreement may be cancelled at the request of the apprentice or may be suspended, cancelled or terminated by the sponsor for good cause, with due notice to the apprentice and a reasonable opportunity for corrective action, and with written notice to the apprentice and to the registration of the final action? X
- a reference incorporating as part of the agreement the standards of the apprenticeship program? X
- a statement that the apprentice will be accorded equal opportunity in all phases of apprenticeship employment and training? X
- the name and address of the appropriate authority, if any, designated under the program to receive; process and

make disposition of controversies or differences which cannot be adjusted locally or resolved in accordance with established trade procedure or applicable collective bargaining provisions? X

5. Do the State provisions provide for registration or approval reciprocity when appropriate for apprenticeship programs in other than the building and construction industry upon request? X

V. State Policies and Procedures which Depart from or Impose Requirements in Addition to 29.12

1. Has the SAC clearly identified and explained operating procedures and practices which depart from or impose requirements in addition to 29.12? X

VI. Other Requirements

Reference: 29.12(b)(9), (b)(10)

- A. Does the submittal include provisions for the cancellation, deregistration and/or termination of programs? (see 29.7 and 29.8) X

-are there provisions for the temporary suspension, cancellation, deregistration and/or termination of approval of apprenticeship agreements?

X —

- B. Does the submittal require for the written acknowledgement of union agreement or "no objection" to the program proposed for registration by an employer or employers' association when standards, collective bargaining agreements or other instruments provide for union participation in any manner on the operation of the substantive matters of the Apprenticeship program?

X —

-If no participation by a union in the program is evidenced or practiced, is there provision for the employer (or employers' association) to submit a copy of its application for registration to the union, if any, which is the collective bargaining agent of the employees to be trained and the registration/approval agency?

X —

-Does the agency allow for a period of not less than 30 nor more than 60 days for receipt of union comments, if any, before taking final action on the application for registration/approval?

N/A - See above

EXHIBIT C

U.S. DEPARTMENT OF LABOR
Employment And Training Administration
Washington, D.C. 20213

October 6, 1977

[LOGO]

Mr. Edward W. Wallace
Chief, Division of Apprenticeship
Standards
Department of Industrial Relations
P.O. Box 603
San Francisco, California 94101

Dear Ed:

The Bureau of Apprenticeship and Training (BAT) has completed its review of the documentation submitted for continued recognition under the provisions of Title 29 Code of Federal Regulations Part 29 by the State of California.

The review reveals the necessity for California to amend portions of the Labor Code and to modify and update regulations, agreement form and the manual in order to conform to Title 29 CFR Part 29.

Enclosed is a checklist identifying the deficiencies as found in our careful review. Those areas where deficiencies were found can be identified by the check mark in the "No" column of the checklist. Since the manual and a copy of the agreement were not included in the submission, it is possible that some of the deficiencies, as identified, are covered in these documents.

Of course, there is the possibility that we may have misinterpreted or overlooked something in our review. We stand ready to discuss any item of your submission

that may be in question. Also, the BAT State Director and the District Coordinator for NASTAD, Inc., can be of assistance to you.

Under authority vested in me under 29 CFR § 19.12(c), I am granting an extension of 120 days for updating the rules, regulations and manual to conform, and an extension until the end of the next legislative session for the enactment of any necessary statutory changes. If your State has an Administrative Procedure Act or any law which would prevent compliance with these time periods, please contact me so that alternative periods for compliance can be worked out.

Sincerely,

/s/ Hugh C. Murphy
HUGH C. MURPHY
Administrator
Bureau of Apprenticeship and Training

Enclosure

CALIFORNIA

TITLE 29 CFR PART 29 CHECKLIST FOR STATE RECOGNITION

This Checklist is designed to assist in reviewing the submissions of SCA States for recognition as required under Title 29 CFR Part 29.

YES NO

I. State Apprenticeship Law – And Regulations

References: 29.12(a)(1); 29.12(b)(1)

- | | | |
|--|------------|----------|
| A. Is there evidence of an acceptable State Apprenticeship Law (or Executive Order)? | <u>X</u> | — |
| 1. Is the apprenticeship agency established in: | | |
| – the State Department of Labor | — | <u>X</u> |
| – another State agency having appropriate jurisdiction over laws and regulations governing wages, hours working conditions? | <u>N/A</u> | — |
| – That State agency presently recognized by the Bureau with a State Official empowered to direct the apprenticeship operation. | <u>X</u> | — |

If yes, name the Agency: *Agriculture and Service Agency*

- | | | |
|---|----------|---|
| 2. Does the Law or regulations state that the following are the characteristics of an apprenticesable occupation: | | |
| – it is customarily learned in a practical way through on structured, systematic program of on-the-job supervised training (29.4(a)). | <u>X</u> | — |
| – it is clearly identified and commonly recognized throughout an industry. | — | — |

Unable to find it spelled out

- it involves manual, mechanical or technical skills and knowledge which require a minimum of 2,000 hours of on-the-job work experience.

X

- it requires related instruction to supplement the on-the-job training.

X

3. Are there regulations adopted to implement the law (or Executive Order)?

- If yes, what is the effective date of the regulations?

Administrative
Code Title 6
Chapter 2

II. State Apprenticeship Council

References: 29.13(a)2; 29.12 (b)(2), (b)(3), (b4)

- A. Is the composition of the State Apprenticeship Agency/Council acceptable?

X

1. Is there evidence that members are familiar with apprenticeable occupations?

 X

Implied only not specific

2. What is the composition - and voting privilege of the council?

	Number of Voting	
	Num- ber	Mem- bers
- Management Representatives	<u>6</u>	<u> </u>
- Labor Representatives	<u>6</u>	<u> </u>
- Public Representatives	<u>2</u>	<u> </u>
- Education Representatives	<u>2</u>	<u> </u>

- Other (specify):

Director of Industrial Relations 1

Total Representatives 17

The Labor Code is not specific on voting members.

3. Are there ex-officio members on the Agency Councils?

 X

Council has no ex-officio members

4. Are ex-officio members also regular voting members? If not, are there established practices and procedures for ex-offices voting privileges under exceptional circumstances?

 X

Council has no ex-officio members

- B. Are the powers and duties of the Council clearly delineated?

X

- C. Are the powers and duties of the State Official for apprenticeship clearly delineated?

X

- Is the State Official a member of the State Agency/Council?

X

- D. Is the Agency/Council or State Official *clearly* (authorized) to register and deregister apprenticeship programs and agreements?

X

Vague as noted in AC-206

- If yes specify who is authorized:

Director of Industrial Relations

- E. Is the procedure for registration and deregistration described?

X

III. State Plan for Equal Employment Opportunity in Apprenticeship

References: 29.12 (a)(3); 29.12(b)(5); 29 CFR Part 30 as amended.

Is there evidence of an acceptable State Plan for EEO in Apprenticeship? X —

— Is the equal opportunity pledge (30.3(b)) included in the submission? X —

Do the State Provisions establish policy(ies) and procedures to promote EEO in apprenticeship programs pursuant to the State plan? X —

Do the State provisions require apprenticeship programs to operate in conformity with the State Plan? X —

IV. Basic Standards, Criteria, and Requirements for Program Registration

References: 12.12(a)(4); 12.12(b)(6), (b)(7)

Does the description of the basic standards for registration/approval of apprenticeship programs comply with 29.5? X —

1. Does the program description incorporate the terms and conditions of employment, training and supervision of one or more apprentices in the apprenticeable occupation? X —

— Are there provisions for all sponsors of apprentice training programs to comply with the terms and conditions set forth in the program description? X —

2. Does the program description include the equal opportunity pledge prescribed in 29 CFR 30.3(b)? — —
Found in EEO Plan only

— When applicable, does the description call for the documentation of an affirmative action plan in accordance with 29 CFR 30.4. A selection method authorized in 29 CFR 30.5 (selection on the basis of rank from a pool of eligible applicants, random selection from a pool of current employees, or an alternative method); or similar requirements expressed in a State Plan for EEO in Apprenticeship and approved by the Department? X —

3. Does the program description include provisions regarding:

— the employment and training of the apprentice in a skilled trade? X —

— a term of apprenticeship which is not less than 2,000 hours of work experience and is consistent with training requirements established by industry practice? X —

— an outline of the work processes in which the apprentice will receive supervised work experience and on-the-job training? X —

— the allocation of approximate time to be spent in each major work process outlined above? X —

- a minimum of 144 hours annually for organized, related and supplemental instruction in technical subjects related to the trade? X —
- a means of approving organized, related and supplemental instructions? X —
- documentation of a progressively increasing schedule of wages to be paid the apprentice consistent with the skill acquired? X —
- periodic review and evaluation of the apprentice's progress in job performance and related instruction? X —
Implied in AC.212 only
- maintenance of appropriate apprentice progress records? X —
- a specific numeric ratio language of apprentices to journeymen consistent with proper supervision, training safety and continuity of employment in terms of job site, work force, department or plant? X —
Broad general language - Not specific
- a probationary period, reasonable in relation to full apprenticeship term (with full credit given for such period toward completion of apprenticeship?) X —

Underlined language not included in Labor Code

- adequate and safe equipment and facilities for supervision, and safety training for apprentices on-the-job and in related instruction? X —
- minimum qualifications required by a sponsor for persons entering the apprenticeship program (with an eligible age starting at not less than 16 years)? X —
- placement of an apprentice under a written apprenticeship agreement as required by the State apprenticeship law and regulation, or the Bureau where no such State law or regulation exists? X —
- does the agreement directly or by reference, contain the standards of the program as part of the agreement? X —
Agreement form not submitted with documentation
- the granting of advanced standing or credit for previously acquired experience, training or skills for all

applicants equally, with commensurate wages for any progression step so granted?

X —

- transfer of employer's training obligation when the employer is unable to fulfill his obligation under the apprenticeship agreement to another employer under the same program with the consent of the apprentice and apprenticeship committee or sponsor?

X —

- assurance of qualified training personnel and adequate supervision on-the-job?

X —

Implied only

- recognition for successful completion of apprenticeship evidenced by an appropriate certificate?

X —

- identification of the registration agency?

X —

- provision for the registration, cancellation and deregistration of the program?

X —

- the prompt submission of any modification or amendment to the program?

X —

- the registration of apprenticeship agreements, modifications and amendments?

X —

- notice to the registration office of persons who have successfully completed apprenticeship programs?

X —

- notice of cancellations, suspensions and terminations of apprenticeship agreements and causes therefore?

X —

Information insufficient as submitted except for EEO as as a cause.

- authority for the termination of an apprenticeship agreement during the probationary period by either party without stated cause?

X —

- a statement that the program will be conducted, operated and administered in conformity with the applicable provisions of 29 CFR Part 30, as amended, or

a State EEO in apprenticeship plan approved by the Department?

X —

- the name and address of the appropriate authority under the program to receive, process and make disposition of complaints?

X —

- the recording and maintenance of all records concerning apprenticeship as required by the Bureau or recognized State Apprenticeship Agency and other applicable law?

X —

4. Does the description of the apprenticeship agreement contain:

- names and signatures of the contracting parties (apprentice, sponsor or employer) and parent or guardian if the apprentice is a minor?

X —

Unable to tell without copy of agreement form

- date of birth of the apprentice?

X —

- name and address of the program sponsor and registration agency?

X —

Unable to tell without copy of agreement form.

- a statement of the trade or craft in which the apprentice is to be trained?

X —

- the beginning date and term (duration) of apprenticeship?

X —

Unable to determine without copy of agreement form.

- a statement showing the number of hours to be spent by the apprentice in work on-the-job?

X —

- a statement showing the number of hours to be spent in related and supplemental instruction (recommended not to be less than 144 hours per year)?

X —

- a statement setting forth a schedule of work processes in the trade or industry divisions in which the apprentice is to be trained

and the approximate time to be spent at each process?

X

- a statement of the graduated scale of wages to be paid the apprentice and whether or not required school time will be compensated?

X

- a statement providing for a specific period of probation during which the apprenticeship agreement may be terminated by either contracting party upon written notice to the registration agency?

X

- a statement providing, after the probationary period, the agreement may be cancelled at the request of the apprentice or may be suspended, cancelled or terminated by the sponsor for good cause, with due notice to the apprentice and a reasonable opportunity for corrective action, and with written notice to the apprentice and to the registration of the final action?

X

- a reference incorporating as part of the agreement the standards of the apprenticeship program?

X

Unable to determine without copy of agreement form

- a statement that the apprentice will be accorded equal opportunity in all phases of apprenticeship employment and training?

X

- the name and address of the appropriate authority, if any, designated under the program to receive, process and make disposition of controversies or differences which cannot be adjusted locally or resolved in accordance with established trade procedures or applicable collective bargaining provisions?

X

5. Do the state provisions provide for registration or approval reciprocity when appropriate for apprenticeship programs in other than the building and construction industry upon request?

 X

Understand a proposed section to council regulations is in process.

V. State Policies and Procedures which Depart from or Impose Requirements in Addition to 29.12

1. Has the SAC clearly identified and explained operating procedures and practices which depart from or impose requirements in addition to 29.12?

— X

Identify

California did not include a copy of the DAS Manual in submission.

VI. Other Requirements

Reference: 29.12(b)(9),(b)(10)

- A. Does the submittal include provisions for the cancellation, deregistration and/or termination of programs? (see 29.7 and 29.8)

— X

DAS Manual not included in submission.

- are there provisions for the temporary suspension, cancellation, deregistration and/or termination of approval of apprenticeship agreements?

— X

DAS Manual not submitted

- B. Does the submittal require for the written acknowledgement of union

agreement or "no objection" to the program proposed for registration by an employer or employers' association when standards, collective bargaining agreements or other instruments provide for union participation in any manner on the operation of the substantive matters of the apprenticeship program?

— X

DAS Manual not submitted

- if no participation by a union in the program is evidenced or practiced, is there provision for the employer (or employers' association) to submit a copy of its application for registration to the union, *if any*, which is the collective bargaining agent of the employees to be trained and the registration/approval agency?

— X

DAS Manual not submitted

- Does the agency allow for a period of not less than 30 or more than 60 days for receipt of union comments, of [sic] any, before taking final action on the application for registration/approval?

— X

DAS Manual not submitted

EXHIBIT D

STATE OF CALIFORNIA - AGRICULTURE AND
SERVICES AGENCY

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF APPRENTICESHIP STANDARDS
455 GOLDEN GATE AVENUE
SAN FRANCISCO 94102

EDMUND G. BROWN JR., Governor

(Seal)

ADDRESS REPLY TO:

P. O. BOX 603

SAN FRANCISCO, CA 94101

December 16, 1977

Mr. Hugh C. Murphy
Associate Manpower Administrator
Bureau of Apprenticeship and Training
U. S. Department of Labor
Patrick Henry Building, Fifth Floor
601 "D" Street, N.W., Room 5000
Washington, D.C. 20213

Dear Mr. Murphy:

We received from you a 29CFR29 checklist indicating areas which were considered deficiencies.

We have assembled copies of our manual sections, which were recently updated, and other information which we feel support our request for recognition of the California Apprenticeship Council by the Secretary of Labor.

The following is our response to the items checked in the "No" column of the checklist:

1. Pg. 1, I.A.1. Copy of the chaptered version of AB 505, Thurman. See Sec. 9.

2. Pg. 2, I.A.2. Manual Section 610.03.
3. Pg. 3, II.A.1. Roster of Council Members, listing their affiliations.
4. Pg. 4, II.A.3 & 4. The Council has no non-voting ex-officio members. There are three members who serve by virtue of their position: 1) the Director of Industrial Relations, 2) the Superintendent of Public Instruction or his designee, and 3) the Chancellor of the California Community Colleges or his designee. See Labor Code Section 3070 attached.
5. Pg. 6, IV.2. Pledge is included in Addendum to Standards. (DAS Forms 167 and 167B) See Manual Section 730.07.
6. Pg. 14, IV.5. Section 206(b), Administrative Code, adopted July 29, 1977, effective September 17, 1977. See attached Information Bulletin No. 77-7.
7. Pg. 14, V.1. The California Apprenticeship Council, under authority of Labor Code Section 3071, is required to establish standards for minimum wages, maximum hours, and working conditions. Also, see California Administrative Code, Title 8, Chapter 2, Article 3, Section 208 attached.
8. Pg. 14, VI.A. Manual Sections 610.07, 610.11, 710.15, and 610.17.
9. Pg. 15, VI.A. See Labor Code Section 3078 (g).
10. Pg. 15, VI.3. See DAS 36, Item #15, written acknowledgement of union agreement. Also see Labor Code Section 3079 and

Administrative Code Sections 218, 219, and 220.

11. Pg. 15, VI.B. Although neither the Labor Code nor the Administrative Code of the State of California provide for a specified period of time for receipt of union comments, if any, before taking final action on an application for registration or approval, we feel the language mentioned above provides sufficient safeguards for union comments. In order to expedite the approval of continued recognition of the State of California under the provision of Section 29, Code of Federal Regulations, Part 29, we request that the language contained in the above-referenced material (Item No. 10) be accepted.

Sincerely,

/s/ Edward W. Wallace
EDWARD W. WALLACE
Chief

EWV:CHG:ct
Attach.

cc: William R. Shuck, NASTAD, Inc.
Kenneth C. Pittman, NASTAD, Inc.
Norris E. Skinner, BAT

EXHIBIT E
CALIFORNIA
STATE APPRENTICESHIP COUNCIL REVIEW

The review was conducted by David G. Turner, Regional Director, and Jerry G. Tabaracci, California BAT State Director on August 13, 1990. We met with Gail Jesswein, Chief, Division of Apprenticeship Standards.

The BAT State Director and staff reviewed some of the records in local DAS offices to assist in the review.

SAC REVIEW CHECKLIST

Part I

1. **IS THERE AN ACCEPTABLE STATE APPRENTICESHIP LAW (OR EXECUTIVE ORDER) AND REGULATIONS ADOPTED PURSUANT THERETO?**

(REFERENCE: TITLE 29 CFR PART 29.12 (a) (1))

Yes. The State of California has a law (Apprenticeship Law in California - Shelley/Maloney Apprentice Labor Standards Act of 1939) and State Apprenticeship Regulations (California Administrative Code Title 8, Chapter 2, Part 1 - Apprenticeship). It is my opinion that the apprenticeship law and state regulations are acceptable under the criteria specified in Title 29 CFR 29. It should be noted however, that the issue of so called "parallel programs" creates a situation within the state that makes it difficult for potential sponsors to secure timely approval of their program, if a similar program already exists for the occupation/trades proposed. Two years or more is not uncommon before final approval is granted.

The current situation related to this issue is of the magnitude to be of concern to BAT in light of our stated position of fair and equitable treatment to all sponsors or potential sponsors. While it can be shown that this is not solely a union vs non-union issue, the greatest impact is on programs proposed by non-union sponsors.

2. IS THE COMPOSITION OF THE SAC ACCEPTABLE?

(REFERENCE: TITLE 29 CFR PART 29.12 (a) (2))

Yes. The California Apprenticeship Council (CAC) is composed of six (6) representatives from employers, six (6) representatives from employee organizations, two (2) representatives from the general public and three (3) ex-officio members representing the Director of the Department of Industrial Relations, Superintendent of Public Instruction, and the Chancellor of the California Community Colleges. The three ex-officio members may appoint his or her permanent and best qualified designee to sit on the Council in their place.

The Governor, by law, has the authority to appoint the Council members, except for the ex-officio members.

3. IS THERE AN ACCEPTABLE STATE PLAN FOR EEO IN APPRENTICESHIP?

(REFERENCE: TITLE 29 CFR PART 29.12 (a) (3))

Yes. The State of California Plan for Equal Opportunity in Apprenticeship was adopted to meet the requirements of Title 29 CFR Part 30. The state plan is nearly identical to the federal regulation, except were [sic] it must conform

to existing California State Law. The Department of Fair Employment and Housing has the authority to investigate and render decisions on all EEO complaints, including apprenticeship under California State Law.

4. IS THERE A DESCRIPTION OF THE BASIC STANDARDS CRITERIA, AND REQUIREMENTS FOR PROGRAM REGISTRATION AND/OR APPROVAL?

(REFERENCE: TITLE 29 CFR PART 29.12 (a) (4))

Yes. The California Code of Regulations (CCR), Title 8, Chapter 2, Part, 1 Article 4, Section 212, contains the basic standards criteria required for approval. See attached copy of the CCR.

5. IS THERE A DESCRIPTION OF POLICIES AND OPERATING PROCEDURES WHICH DEPART FROM OR IMPOSE REQUIREMENTS IN ADDITION TO THOSE PRESCRIBED IN TITLE 29 CFR PART 29?

(REFERENCE: TITLE 29 CFR PART 29.12 (a) (5))

Yes. It is my opinion that Title 8, Chapter 2, Part 1, Article 4, Section 212.2 does establish a policy and operating procedure which is in addition to those prescribed in Title 29 CFR 29. While it can be argued that so called "parallel programs" eventually get approved by the Division of Apprenticeship Standards (DAS), it is also clear that there is a significant time delay in California's apprenticeship program approval process due to this California Regulation provision. It should be noted that the position of

DAS is that this Section of the California Code of Regulations is not in conflict with Title 29 CFR 29.

6. **IS THE APPRENTICESHIP AGENCY ESTABLISHED IN THE STATE DEPARTMENT OF LABOR, OR THE STATE AGENCY HAVING JURISDICTION OF LAWS AND REGULATIONS GOVERNING WAGES, HOURS, AND WORKING CONDITIONS, OR THAT STATE AGENCY RECOGNIZED BY THE BUREAU IN FEBRUARY 1977 WITH A STATE OFFICIAL EMPOWERED TO DIRECT THE APPRENTICESHIP OPERATION?**

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (1))

Yes. DAS is in the Department of Industrial Relations (DIR), and DIR is responsible for the administration and enforcement of all state labor laws. The Chief of DAS is empowered to direct the apprenticeship program within the state. (See California Labor Code (CLC), Apprenticeship Law in California Section 3073).

7. **IS THE STATE APPRENTICESHIP COUNCIL (SAC) COMPOSED OF PERSONS FAMILIAR WITH APPRENTICEABLE OCCUPATIONS AND AN EQUAL NUMBER OF REPRESENTATIVES OF EMPLOYER AND EMPLOYEE ORGANIZATIONS?**

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (2))

Yes. Neither the apprenticeship law nor administrative code requires that persons appointed to the California Apprenticeship Council (CAC) be familiar with apprenticeship occupations. Equal numbers of management and

labor representatives sit on the CAC, six from each group. The Governor, as a matter of past practice, has endeavored to appoint individuals to the CAC that have a strong interest in the apprenticeship system and represent various industrial groups.

8. **IS THERE CLEAR DELINEATION OF THE RESPECTIVE POWERS AND DUTIES OF THE STATE OFFICIAL AND THE COUNCIL?**

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (3))

Yes. The current operating procedures are clear as to what responsibilities are the CAC's and which duties fall within the jurisdiction of DAS.

The CAC is actually tripartite in that it is regulatory, advisory, and the appellant body in matters of appeal relating to decisions or actions taken by DAS. The Chief of DAS is responsible for the daily operation of the agency and adherence to applicable apprenticeship laws and regulations. (See CLC, Apprenticeship Law in California Section 3073).

9. **IS THERE A CLEAR DESIGNATION OF OFFICER OR BODY AUTHORIZED TO REGISTER OR Deregister APPRENTICESHIP PROGRAMS AND AGREEMENTS?**

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (4))

Yes. DAS has the authority to approve programs. (See CLC, Chapter 4, Section 3075 & 3090). The deregistration authority is not clear, but as a matter of internal policy

and operating procedure, DAS believes it has the authority to take deregistration action if necessary.

Apprenticeship agreements are approved by JAC's or by the administrator where no collective bargaining agreement exists. The agreements are then submitted to DAS for registration. (See CLC, Sec. 3078, 3079 and 213 of the CCR.)

10. ARE THERE POLICIES AND PROCEDURES ESTABLISHED TO PROMOTE EQUALITY OF OPPORTUNITY IN APPRENTICESHIP PURSUANT TO A PLAN FOR EEO IN APPRENTICESHIP WHICH ADOPTS AND IMPLEMENTS REQUIREMENTS OF TITLE 29 CFR PART 30 AND REQUIRES APPRENTICESHIP PROGRAMS TO OPERATE IN THE CONFORMITY WITH SUCH STATE PLAN?

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (5))

Yes. The CAL Plan (EEO Plan for Apprenticeship) is the policy and operating procedure for DAS relating to EEO in apprenticeship for California. (See Appendix CCR, Title 8, Chapter 2, Part 1, Section 215.)

11. DOES THE SAC ASSURE, WHERE APPROPRIATE, THAT SPONSORS ARE DETERMINING THE NECESSITY FOR GOALS AND TIMETABLES BASED UPON PROPER ANALYSIS?

(REFERENCE: TITLE 29 CFR PART 30.4 (e))

Yes. Program sponsors are required to do an analysis to determine if goals and timetables are appropriate. If the sponsor needs assistance or declines to do the analysis,

then DAS staff performs this function for the program sponsor. (See CAL Plan, Affirmative Action [e], Pg. 9.)

12. DOES THE SAC ASSURE THAT, WHERE APPROPRIATE, SPONSORS ESTABLISH GOALS AND TIMETABLES ON THE BASIS OF ANALYSES OF UNDER-UTILIZATION OF MINORITIES AND WOMEN AND ITS ENTIRE AFFIRMATIVE ACTION PROGRAM?

(REFERENCE: TITLE 29 CFR PART 30.4 (f))

Yes. Program sponsors are required to establish goals and timetables if the analysis determines this is appropriate. If the sponsor fails to establish the appropriate goals and timetables, then DAS staff establishes the goals/timetables. As a matter of past practice, DAS staff generally establishes the goals and timetables for all appropriate program sponsors. (See CAL Plan, Affirmative Action [f], Pg. 10.)

13. DOES THE SAC CONDUCT TIMELY AND COMPLETE EEO COMPLIANCE REVIEWS OF STATE REGISTERED PROGRAMS INCLUDING DETERMINATION IF A SPONSOR HAS MET ITS GOALS WITHIN TIMETABLES OR WHETHER IT HAS MADE GOOD FAITH EFFORTS?

(REFERENCE: TITLE 29 CFR PART 30.4 (f))

Yes. Compliance reviews are conducted annually on all programs with five or more apprentices, except for programs operating under court order or consent decrees. Programs granted exemptions from the state EEO apprenticeship plan, such as Federal facilities are not reviewed

for compliance. A compliance determination is made annually by DAS for each program specifying the nature of compliance, whether good faith effort or from having met the goals. As necessary, DAS sends corrective action letters to appropriate program sponsors as one way of encouraging greater EEO effort on the part of program sponsors.

14. DOES THE SAC DE-REGISTER FOR NON-COMPLIANCE WITH EEO IN APPRENTICESHIP REQUIREMENTS AND NOTIFY BAT OF SUCH ACTIONS?

(REFERENCE: TITLE 29 CFR PART 30.15 (a) (5))

Yes. While DAS has not deregistered any programs for non-compliance with EEO regulations they have the authority to do so and have agreed to notify BAT if such action becomes necessary.

15. DOES THE SAC MAINTAIN RECORDS?

(REFERENCE: TITLE 29 CFR PART 30.8 (d) & (e))

Yes. A review of the records maintained by DAS indicates that adequate data is maintained on both apprentices and programs. The record keeping system is computerized. Due to the earthquake there was a delay in getting some statistical data from DAS for a period of time, but that problem has now been resolved. DAS does not participate in AMS. The official files are maintained in the District offices, with duplicate files held at DAS headquarters.

16. DOES THE SAC PROVIDE RECORDS AND DOCUMENTS TO BAT PERTINENT TO TITLE 29 CFR PARTS 29 & 30 WHEN REQUESTED?

(REFERENCE: TITLE 29 CFR PART 30.8 (d) & (e))

Yes. DAS has been very cooperative in supplying requested information/data to BAT whenever requested to do so.

17. ARE THE CONTENTS OF APPRENTICESHIP AGREEMENTS PRESCRIBED?

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (6))

Yes. The contents of the agreement are prescribed in CLC, Sec. 3078, pages 9 & 10. (See 3078 a through k.)

18. IS THE REGISTRATION OF APPRENTICESHIP PROGRAMS LIMITED TO THOSE PROVIDING TRAINING IN "APPRENTICEABLE" OCCUPATIONS AS DEFINED IN TITLE 29 CFR PART 29.4?

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (7))

Yes. Programs under consideration for registration must meet the criteria established in the CCR, Title 8, Chapter 2, Part 1, Art. 2, 205 (c) and (e). This is similar to Title 29 CFR 29, 29.4, but does not include Part (b) "identified and recognized by industry." DAS has indicated that while their law/administrative code does not address the "industry recognition" requirement, as a matter of policy and operating procedure, they do survey industry prior to recognizing new occupations. Recently DAS recognized several occupations for a program sponsored by the Laborers and a group of signatory contractors which

ended up becoming involved in a jurisdictional dispute with other existing program sponsors. This program was withdrawn by the sponsor during the appeals process.

19. **IS REGISTRATION OR APPROVAL RECIPROCITY, GRANTED, IF REQUESTED, TO APPRENTICESHIP PROGRAMS AND STANDARDS OF EMPLOYERS AND UNIONS WHICH JOINTLY FORM A SPONSORING ENTITY ON A MULTI-STATE BASIS IN OTHER THAN THE BUILDING AND CONSTRUCTION INDUSTRY?**

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (8))

Yes. An acceptable reciprocity statement is contained in the CCR, Title 8, Chapter 2, Part 1, Art. 4, Sec. 212.1. This does not appear to be a problem area. Recently DAS granted reciprocity recognition to the National Fire Fighters program.

20. **IS THERE PROVISION FOR CANCELLATION, DE-REGISTRATION, AND/OR TERMINATION OF APPROVAL OF PROGRAMS, AND FOR TEMPORARY SUSPENSION, CANCELLATION, DE-REGISTRATION AND/OR TERMINATION OF APPROVAL OF APPRENTICESHIP AGREEMENTS?**

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (5))

Yes. If there is an EEO violation involved. However, neither the law nor administrative code is specific on the issue of program cancellation or deregistration. DAS does cancel programs that are inactive and has indicated that they will initiate action to deregister a program for cause,

following the procedures outlined in the CCR, Title 8, Chapter 2, Part 1, Art. 1, Sec. 201, 202, and 203. The cancellation of apprenticeship agreements is found in CCR, Title 8, Chapter 2, Part 1, Art. 4, Sec. 213.

21. **IS THERE PROVISION FOR WRITTEN ACKNOWLEDGEMENT OF UNION AGREEMENT OR "NO OBJECTION" TO REGISTRATION WHEN A PROGRAM IS PROPOSED FOR REGISTRATION BY AN EMPLOYER OR EMPLOYER'S ASSOCIATION AND WHERE THE STANDARDS, COLLECTIVE BARGAINING AGREEMENT OR OTHER INSTRUMENT PROVIDES FOR PARTICIPATION BY A UNION IN ANY MANNER IN THE OPERATION OF THE SUBSTANTIVE MATTERS OF THE APPRENTICESHIP PROGRAM AND SUCH PARTICIPATION IN [sic] EXERCISED?**

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (10))

Yes. The language in the CLC is not the same as what is contained in Title 29 CFR 29, but I believe the intent and basic safeguards are addressed. DAS operating procedures and policy will not permit the registration of a unilaterally sponsored program if there is a bargaining agreement in place. (See CLC, Sec. 3075, Pg. 7.)

22. UNDER THE CONDITIONS INDICATED IN # 21 ABOVE WHERE NO SUCH PARTICIPATION IS EVIDENCED AND PRACTICED, IS THE UNION, IF ANY, WHICH IS THE COLLECTIVE BARGAINING AGENT, FURNISHED A COPY OF THE APPLICATION FOR REGISTRATION AND OF THE APPRENTICESHIP PROGRAM?

(REFERENCE: TITLE 20 CFR PART 29.12 (b) (10))

Yes. DAS has stated that they would provide a copy of any proposed program to the bargaining agent and request their comments, before acting on the request for approval/recognition. Neither the CLC nor CCR specifically requires such action by DAS.

23. UNDER THE CONDITIONS OF # 21 & # 22 ABOVE, DOES THE STATE AGENCY PROVIDE A PERIOD OF NOT LESS THAN 30 DAYS NOR MORE THAN 60 DAYS FOR RECEIPT OF UNION COMMENTS BEFORE FINAL ACTION ON THE APPLICATION?

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (10))

No. The law does not address this issue as it relates to timeframes for comments. DAS has indicated that they would, as a matter of operating procedure, allow at least 30 days for comment before acting on any request for registration from a sponsor subject to a bargaining agreement.

In my opinion this is not an area of concern, in light of the past operating procedure of DAS.

24. DOES THE SAC REQUIRE FOR APPROVAL/REGISTRATION THAT APPRENTICESHIP PROGRAMS CONFORM TO EACH OF THE STANDARDS OF APPRENTICESHIP AS PROVIDED IN TITLE 29 CFR PART 29 (29.5)?

(REFERENCE: TITLE 29 CFR PART 29.12 (b) (10))

Yes. A review of the CLC, CCR and the DAS form 51 (Boilerplate Standards) indicate that all 22 items required by Title 29 CFR 29 - 29.5 are included in DAS's operating procedures and policies. Programs that do not include the necessary provisions/statements would not likely be approved by DAS.

NOTE: All items checked "NO" should be thoroughly addressed in the accompanying narrative report submitted to the BAT Director.

MANAGEMENT REVIEW OF SAC OPERATIONS

Part II

I. ADMINISTRATIVE

- A. LIST CURRENT COUNCIL MEMBERS, THEIR AFFILIATION AND THE AREAS THEY REPRESENT (LABOR, MANAGEMENT, PUBLIC).

See attached listing of the current members of the California Apprenticeship Council.

- B. HOW OFTEN DOES THE COUNCIL MEET AND WHEN WAS THE LAST MEETING?

The CAC meets quarterly, the last two days of the last full week for the months of January, April, July and October. The meetings are held at various locations throughout the state. The last meeting was held

in San Francisco, California on July 26 & 27, 1990.

C. BRIEFLY DESCRIBE THE DUTIES OF THE COUNCIL.

See attached "Obligations and Duties of the Council."

D. WHAT IS THE ROLE OF THE COUNCIL, ADVISORY OR REGULATORY?

The CAC is actually tripartite in that it serves as regulatory, advisory and as an appellate body on matters of appeal. (See CLC 3070, 3071 & 3073.)

E. GIVE THE NAME AND TITLE OF THE ADMINISTRATIVE HEAD OF THE OPERATING STAFF OF THE STATE APPRENTICESHIP AGENCY.

The DAS Chief is Gail W. Jesswein. He also serves as the Secretary to the CAC.

F. BRIEFLY DESCRIBE THE DUTIES OF THE STATE OPERATING STAFF.

The staff of DAS promotes and develops new apprenticeship programs, provides consulting services, promotes EEO, enforces related public works law, conducts compliance reviews and all other duties normally associated with the work of apprenticeship representatives.

G. PROVIDE THE NUMBER AND TYPE OF STATE POSITIONS DEVOTED TO APPRENTICESHIP. INDICATED THE PERCENTAGE OF TIME DEVOTED TO APPRENTICESHIP IF POSITIONS HAVE OTHER RESPONSIBILITIES.

There is a total of 59 professional staff and 45 support staff positions. The breakout is shown below:

- 6 Managers
- 11 Supervisors
- 41 Consultants
- 1 Attorney
- 45 Clerical

DAS staff devotes time to apprenticeship activities, public works enforcement, VA approval, and OJT activities.

The breakout of the time devoted to each activity is shown below:

- 92.6% Apprenticeship Activity
- 5.4% Public Works Enforcement
- 2.0% VA Approval & OJT Activity

H. WHAT IS THE DOLLAR AMOUNT OF THE STATE APPRENTICESHIP BUDGET?

The budget for DAS for FY 90/91 is \$5.834 million, but this was not provided to DIR in this FY's appropriation. Currently, DIR is funding DAS out of the general DIR budget. Efforts are underway to establish some type of self funding fee system. The current situation is very serious and the lack of funding for DAS may become critical before the end of the FY.

I. DESCRIBE THE OPERATING WORK LOAD DIVISION BETWEEN THE SAC AND BAT, E.G., GEOGRAPHICALLY, BY INDUSTRY OR TRADE.

There are no geographical, industry or trade divisions used in determining the assignment of workload to DAS/BAT staff. The number of programs assigned to BAT and DAS staff is shown below:

BAT - Programs	33	Apprentices	3,099
DAS - Programs	1,563	Apprentices	47,663

J. INDICATE THE TYPE OF WORK DONE BY SAC STAFF AND THE TYPE DONE BY BAT STAFF, E.G., DO BOTH BAT AND SAC DEVELOP, SERVICE, AND MAKE EEO REVIEWS?

The staff of both agencies (BAT/DAS) perform similar duties except that DAS staff is responsible for VA and OJT approval, plus State Public Works Enforcement. BAT staff is not currently involved in these activities. Otherwise, both agencies' staffs provide service, promote and develop programs and conduct compliance reviews (EEO).

K. IS THERE A CURRENT WRITTEN COOPERATIVE OPERATIONAL POLICY BETWEEN BAT/SAC?

Yes. A cooperative working agreement was signed between BAT/DAS on February 24, 1986. This agreement is still in place and utilized by the two agencies as necessary.

II. DATA COLLECTION

A. WHAT IS THE TOTAL NUMBER OF ACTIVE PROGRAMS AND APPRENTICES REGISTERED BY THE STATE?

The following statistical data was provided by DAS. The data is as of June 30, 1990.

Total Apprentices	50,762
Total Programs Single Plant	1,075
Total Group Programs	521

B. IS THE STATE'S DATA COLLECTION SYSTEM AUTOMATED?

Yes. The DAS data collection system is automated. Program and individual apprentices data is collected under the current system.

C. INDICATE THE NUMBER OF PROGRAMS AND APPRENTICES IN THE WORK LOAD OF THE SAC STAFF AND IN THE WORK LOAD OF THE BAT STAFF.

The number of programs and apprentices serviced by DAS and BAT staff are shown below:

BAT Programs	33	Apprentices	3,099
DAS Programs	1,563	Apprentices	47,663

D. HOW MANY NEW PROGRAMS WERE REGISTERED BY THE STATE IN THE LAST 12 MONTHS?

A total of 123 new programs were registered in the last 12 months (7/1/89 to 6/30/90).

E. HOW MANY PROGRAMS WERE DE-REGISTERED IN THE LAST 12 MONTHS?

DAS has not deregistered any programs in the last 12 months. Inactive programs are cancelled on an "as needed" basis.

F. HOW MANY PROGRAMS WERE CONSIDERED FOR REGISTRATION DURING THE LAST 12 MONTHS THAT WERE DENIED REGISTRATION?

DAS has not denied registration to any program in the last 12 months. Six programs approved by DAS are under appeal to the CAC. DAS program approvals are subject to review by the CAC through the appeals process. The CAC has the authority to overturn the DAS approval/recognition.

III. POLICY

A. FOR THOSE PROGRAMS DE-REGISTERED IN THE LAST 12 MONTHS, WHAT WERE THE SPECIFIC REASONS FOR DE-REGISTRATION IN EACH CASE?

DAS has not deregistered any programs in the last 12 months.

B. FOR THOSE PROGRAMS CONSIDERED FOR REGISTRATION DURING THE LAST 12 MONTHS THAT WERE DENIED REGISTRATION, WHAT WERE THE SPECIFIC REASONS FOR DE-REGISTRATION IN EACH CASE?

DAS has not denied registration to any programs within the past 12 months. However, six programs approved by DAS have had their DAS approval

appealed to the CAC. The CAC may overturn the DAS approval on any or all of the programs currently before them.

C. WHAT OCCUPATIONS, IF ANY, ARE RECOGNIZED BY THE STATE AS APPRENTICEABLE WHICH BAT DOES NOT RECOGNIZE?

There are a substantial number of occupations recognized by DAS that are not BAT approved. (See attached listing of these occupations.)

Part of the problem with some of the occupations recognized by DAS is that the DOT numbers utilized to identify these occupations include the use of letters for the last digit. This causes them to be different than the DOT number used by BAT. If DAS would use only approved/recognized DOT numbers I believe there would be less confusion and fewer differences between what BAT has approved and what DAS has recognized.

D. HAS THE STATE REFUSED TO RECOGNIZE ANY OCCUPATIONS RECOGNIZED BY BAT AS APPRENTICEABLE? IF SO, NAME AND GIVE THE REASONS FOR REFUSAL.

DAS has refused to approve/recognize one BAT approved occupation, Bartender.

E. DOES THE STATE RECOGNIZE PROGRAMS REGISTERED IN OTHER STATES?

Yes. DAS has recognized programs registered in another state through a Memorandum of Understanding, such as the Tahoe Agreement between California and Nevada. DAS staff informed me that the

reciprocity provision could be used if a Memorandum of Understanding did not exist. (See Title 8, Chapter 2, Part 1, Art. 4, Sec. 212.1 of the CCR.)

F. DOES THE STATE HAVE A LITTLE DAVIS-BACON ACT?

Yes. The State of California does have a little Davis/Bacon Law. (See attached copy of the Laws and Regulations Governing the Payment of Prevailing Wages.)

G. HAVE ANY SIGNIFICANT CHANGES BEEN MADE IN THE STATE APPRENTICESHIP POLICIES OR PROCEDURES SUBSEQUENT TO RECOGNITION APPROVAL BY THE SECRETARY? IF SO, WHAT WERE THEY AND WERE THEY SUBMITTED TO BAT FOR REVIEW AND COMMENTS?

Yes. A summary of those changes was submitted with the 1988 California SAC Review. Since then there has been one major change that could have significant impact. In this year's state budget process, the Department of Industrial Relations did not receive funding for DAS. The legislature then passed Bill AB 116 which permitted the Director of DIR to establish a "fee system" for apprenticeship, which in theory, would make DAS self funded. The Governor signed that Fee System Bill into law. DIR is now going through the process of setting a regulatory process to implement a fee system for apprenticeship. There is widespread concern within the apprenticeship community related to this proposed fee system and considerable speculation that it will not generate sufficient revenue to save DAS. Currently DAS is being funded from the general appropriations provided to DIR. Information provided by DAS staff indicates that the commitment to fund DAS from

DIR's general appropriation may be limited to the end of December 1990. In my opinion, this proposed fee system will not work and further we can expect to see upwards of 50% of the current program sponsors drop their programs with DAS if and when the fee system is implemented. There may be considerable confusion over the next few months as DAS and DIR struggle to resolve the problems facing the continuation of DAS and a state operated apprenticeship system. The possibility exists that BAT may be required to assume the responsibility for apprenticeship in California, if the problems facing DAS are not resolved in the near future. It appears to me, that BAT will need to assess very carefully the implementation of a fee system for apprenticeship in California and determine if it is the Department of Labor's best interest to continue recognition of California, if the fee system has a negative impact on programs and apprentices.

H. ARE THERE ANY STATE POLICIES OR PROCEDURES THAT LIMIT THE ACCESSIBILITY OF ANY POTENTIAL SPONSORS TO THE APPRENTICESHIP SYSTEM? IF SO, EXPLAIN.

Yes. This same question has been addressed in past reviews and it is still my opinion that Title 8, Chapter 2, Part 1, Art. 4, Section 212.2 of the CCR is limiting access to potential sponsors. The significant sentence of administrative code 212.2, is "approval shall be denied if prevailing conditions would in any way be lowered or adversely affected."

While so called "parallel programs" have been approved by DAS, the time delay, in the approval process, can be and is often extremely long. When you add the CAC's appeals process to DAS's review

and approval process, you find some potential programs still awaiting final approval after two years. Then you have court action, initiated by the existing program sponsor, on top of the agency's review, approval and appeals process.

Several programs are in various stages of the review, approval or appeals process within the so called "parallel program" issue. One parallel program has succeeded in maintaining DAS recognition through a California District Court, but that decision has been appealed by existing program sponsors, so the issue is still not resolved. It appears that this situation will remain unchanged for a significant period of time. I do not see any resolution of the problem in the foreseeable future, unless DAS should fail to find a way out of the budget mess they are currently in and simply cease to exist. Should that happen, then BAT would have to assume the responsibility for registration of programs and apprentices and the so called "parallel program" issue would cease to be an issue in California so far as BAT is concerned.

EXHIBIT F

STATE OF CALIFORNIA
COOPERATIVE WORKING AGREEMENT
FOR THE
DIVISION OF APPRENTICESHIP STANDARDS
AND
BUREAU OF APPRENTICESHIP AND TRAINING
PREAMBLE:

The Bureau of Apprenticeship and Training and the Division of Apprenticeship Standards have the responsibility

to work as complimentary units to promote, develop, and maintain both apprenticeship and other on-the-job training systems. This responsibility is necessary in order to carry out the provisions of Public Law 308 (Fitzgerald Act); the California Apprenticeship Law (Shelley-Maloney Apprentice Labor Standards Act of 1939, Chapter 4, Division 3, Labor Code of California); and Title 8, Chapter 2, California Administrative Code. Each agency shall maintain its own identity, but will perform similar work in a like manner to accomplish these objectives.

COMMITTEE:

There shall be established a committee, hereinafter referred to as "The DAS/BAT State Coordination Committee," composed of the Chief and the Deputy Chief, Division of Apprenticeship Standards, and the Regional and State Directors of the Bureau of Apprenticeship and Training. It shall be the function of this Committee to:

1. Select a Chairman and a Secretary; one of whom shall be from each agency. The Chairman and Secretary shall rotate between agencies annually.
 - (a) The full committee shall constitute a quorum.
2. Hold at least one regular meeting a year and special meetings at the call of either agency solely for the purpose of discussing this working agreement, to make certain that the full intent and purpose of the provisions are being fully adhered to.

3. Hold such other meetings as may be necessary for the Committee to develop procedures for promotional activities [sic] and improvements of apprenticeship and other on-the-job training in all industries.
4. Keep written records of each meeting and distribute a copy of same to all members.
5. All decisions shall be binding upon both parties subject to an appeal to the next higher authority of each agency.
6. Discuss and make recommendations on methods of improving and expanding apprenticeship and training in the State of California

STATEWIDE COMMITTEE ASSIGNMENTS:

The Committee shall review, from time to time, present State Committee assignments. This list shall be kept up to date and, when necessary, the Chief of the Division of Apprenticeship Standards shall make reassignments in consultation with the State Director of the Bureau of Apprenticeship and Training. Only one assigned representative will service a State Committee.

ESTABLISHMENT OF NEW DISTRICT OR LOCAL OFFICES

The Division of Apprenticeship Standards shall have the prerogative to establish new District or Local Offices and assign personnel. The Bureau of Apprenticeship and Training shall have the prerogative to establish, close or relocate field offices in California, but agrees to consult

with the Chief the Division of Apprenticeship Standards prior to the implementation of any changes.

WORKING PROCEDURES:

Working procedures will be developed by this Committee where necessary. Working procedures shall define:

1. Working assignments including geographical area of assignment.
 - (a) Service
 - (b) Promotion
 - (c) Special Assignments
2. Cooperation

It is recognized that each agency may, from time to time, receive directives that require contacting industry and trades not assigned or travel from one district or area to another in carrying out said directives. When such is the case, these special activities will be communicated to the other agency. All BAT-DAS representatives' activities which do not come within the scope of these agency directives will be confined to their local work assignments. All papers, reports, requests, etc., having to do with a certain assignment shall be channeled through the representative having that assignment.

SUPERVISION:

It is understood that supervision of the staff of the Bureau of Apprenticeship and Training rests with the State Director of the Bureau of Apprenticeship and Training, and supervision of the staff of the Division of Apprenticeship

Standards rests with the Chief of the Division of Apprenticeship Standards and his authorized representatives.

LIAISON:

The Division of Apprenticeship Standards will keep the Bureau of Apprenticeship and Training informed of all policies and procedures adopted by the California Apprenticeship Council. The Bureau of Apprenticeship and Training will keep the Division of Apprenticeship Standards informed of all policies and procedures adopted by the Bureau of Apprenticeship and Training. This information shall flow through the Headquarters office of each agency. It is agreed that all operations in apprenticeship will be governed by State law and rules and regulations of the California Apprenticeship Council and for federal purposes, the Federal apprenticeship regulations.

APPRENTICESHIP STANDARDS:

In the development of new apprenticeship standards, or the revision of existing apprenticeship standards, there shall be included a provision for an advisor to the Apprenticeship Committee from the Division of Apprenticeship Standards or the Bureau of Apprenticeship and Training. All new registered apprenticeship programs shall be consistent with the provisions of state law and regulation.

SURVEYS:

Surveys and other like assignments made in any industry or area shall be conducted after consultation of the parties.

PROMOTIONAL EFFORTS:

In order to increase the number of apprentices as well as to improve the existing apprenticeship programs, plans for the following will be developed.

1. Apprenticeship goals by major industries.
2. Apprenticeship linkage with target populations.
3. Staff development training.
4. Promotion of equal employment opportunity for minorities and women consistent with the California Plan for Equal Opportunity in Apprenticeship.
5. Improvement of the quality of apprenticeship training both on the job and in related, supplemental instruction.

PUBLICITY AT ALL LEVELS:

Steps shall be taken by the representatives of both agencies to see that favorable publicity is obtained for the California Apprenticeship program.

COMPLETION CEREMONIES:

It is the policy of both agencies to aid and assist Labor and Management in the promotion of mass or individual

occupation completion ceremonies. Representatives of both agencies shall work jointly on such general ceremonies when their assignments include one or more participating Program Sponsor. Where there is no representative of the other agency assigned, efforts will be made to have the State Headquarters of the agencies receive an invitation to participate in the ceremonies.

APPRENTICESHIP CERTIFICATES:

Apprenticeship Completion Certificates shall be awarded by a member of the California Apprenticeship Council or by a staff member of the Division of Apprenticeship Standards or Bureau of Apprenticeship and Training to completing apprentices upon the request of the program sponsors, except for Federally registered programs. California completion certificates will be issued in California unless the Division of Apprenticeship Standards authorizes the issuance of Bureau of Apprenticeship and Training certificates.

JOINT TRAINING CONFERENCES:

Training conferences will be held and conducted jointly. These conferences shall be planned by staff of the Division of Apprenticeship Standards and appropriate representatives of the Bureau of Apprenticeship and Training. When necessary, time shall be allotted so that each agency may meet separately to discuss problems which are of interest only to that agency.

All other business shall be postponed insofar as possible so that conference sessions and committee meetings may be held without interruption and with full attendance.

LOCAL STAFF ASSIGNMENTS:

Written staff assignments regarding consultative services to Program Sponsors will be made by the responsible Senior Apprenticeship Consultant in consultation with the Area Administrator. Assignment proposed for Bureau of Apprenticeship and Training staff shall have the approval of the Bureau of Apprenticeship and Training California State Director. Fully trained staff of both agencies will share an equal workload assignment for this activity. If there is a dispute over local Program Sponsor assignments, the recommendations from both agencies will be sent forward to the State DAS/BAT Coordination Committee for resolution.

LOCAL STAFF MEETINGS:

Division of Apprenticeship Standards Senior Consultants will conduct staff meetings on a regular schedule. Staff of both agencies assigned to the local areas are expected to regularly attend these meetings.

The Senior Consultant will write the Bureau of Apprenticeship and Training Field Representative for their input regarding agenda items.

MISUNDERSTANDINGS:

If a misunderstanding arises between BAT-DAS representatives, the following procedure shall be followed in the settlement of such misunderstandings:

1. Any representative who feels that another representative has erred in any way in carrying out this joint cooperative effort or is not adhering to the spirit of the general procedure outlined herein, or is digressing from the assigned responsibility, shall contact such representative for a discussion of the question or questions involved, in an effort to arrive at an amicable understanding.
2. In the event an understanding cannot be reached in accordance with #1 above, the individuals shall submit the matter to their designated supervisors. These two shall confer as early as possible in an effort to reach a decision on the matter and, if one is reached, it shall be transmitted to the parties involved.
3. If they cannot agree, then the matter shall be referred to the State DAS/BAT Coordination Committee.

In the event a representative of either agency receives a complaint from anyone reflecting upon the work of another representative, it shall be the duty of the representative receiving such complaint to tell the one complained of about such complaint, in order that the one involved may have an opportunity to correct or clarify the reason for such complaint. At no time should any

representative promote or encourage criticism of another representative of either agency.

The Bureau of Apprenticeship and Training, subject to its regulations, policies and procedures, has herein agreed to adhere to the policy of the California Apprenticeship Council. The Bureau of Apprenticeship and Training State Director shall be designated as the Bureau's representative to participate and represent the Bureau at all meetings of the California Apprenticeship Council and its standing committee.

TRANSMISSION OF FORMS:

All apprenticeship standards and the Division of Apprenticeship Standards forms dealing with apprenticeship, including Apprenticeship Agreements, will be submitted through the local Division of Apprenticeship Standards office. The Division of Apprenticeship Standards local offices will transmit all apprenticeship material in accordance with established procedures.

CALIFORNIA COUNCIL REPORTS:

The Division of Apprenticeship Standards and the Bureau of Apprenticeship and Training will each compile and forward to the California Apprenticeship Council a quarterly report.

STATISTICAL DATA:

Both agencies will cooperate in the development of statistical data relative to the State and Federal automated information systems.

MODIFICATION:

This agreement may be amended or modified at any time by mutual consent of the Committee. Suggestions for amendments may be made in writing by representatives of either agency through their supervisors to the Committee. When such changes are made and approved by the signatories hereto, or their successors, all representatives shall be notified.

These procedures shall remain in effect until modified or terminated upon request of either party upon sixty (60) days notice. These procedures supersede and replace all other procedures which previously covered the matters herein contained.

APPROVED this 24th day of February, 1986.

/s/ David G. Turner
Regional Director
U.S. Department of
Labor
BUREAU OF
APPRENTICESHIP
AND TRAINING

/s/ Jerry G. Tabaracci
State Director
U.S. Department of
Labor
BUREAU OF
APPRENTICESHIP
AND TRAINING

/s/ Gail W. Jesswein
Chief
State Department of
Industrial Relations
DIVISION OF
APPRENTICESHIP
STANDARDS

/s/ Eugene P. Janvier
Deputy Chief
State Department of
Industrial Relations
DIVISION OF
APPRENTICESHIP
STANDARDS

EXHIBIT G**[SEAL]**

State of California
CALIFORNIA APPRENTICESHIP COUNCIL
Department of Industrial Relations
Division of Apprenticeship Standards
P. O. Box 603
San Francisco, CA 94101
(415) 737-2700

APPELLANT

Northern California and Northern Nevada Sound and Communication Joint Apprenticeship and Training Committee

REAL PARTY IN INTEREST

Electronics and Communications Systems Joint Apprenticeship and Training Committee

RESPONDENT

Chief, Division of Apprenticeship Standards, Decision in The Matter of Electronic and Communication Systems Joint Apprenticeship and Training Committee

NOTICE OF DECISION**CASE NO. 19532**

The California Apprenticeship Council met on October 26, 1990 at Sacramento, California.

During this meeting the Council acted upon the above-referenced matter. Transmitted herewith is the Decision of the California Apprenticeship Council.

/s/ Rita Tsuda
Rita Tsuda, Aide
California Apprenticeship Council

Dated: October 31, 1990

Enc.

cc: Miles Washington, Dep. Att. Gen.
Appren. Board Members

CAC 406 (Rev. 4/90)

NOTICE OF DECISION

CALIFORNIA APPRENTICESHIP COUNCIL
APPEAL BOARD

NORTHERN CALIFORNIA AND	)	No. 19532
NORTHERN NEVADA SOUND)	
AND COMMUNICATION JOINT	)	PROPOSED
APPRENTICESHIP AND	)	<u>DECISION OF</u>
TRAINING COMMITTEE,	)	<u>THE</u>
Appellant,	)	CALIFORNIA
	)	<u>APPRENTICESHIP</u>
v.	)	<u>COUNCIL</u>
	)	<u>APPEAL</u>
DECISION OF THE CHIEF,	)	<u>BOARD</u>
DIVISION OF APPRENTICESHIP)	
STANDARDS, IN THE MATTER)	
OF ELECTRONIC AND)	
COMMUNICATIONS JOINT)	
APPRENTICESHIP AND)	
TRAINING COMMITTEE,)	
Respondent.)	
)	

Northern California and Northern Nevada Sound and Communication Join Apprenticeship and Training Committee appealed from the decision of the Chief, Division of Apprenticeship Standards dated August 15, 1989.

Pursuant to Title 8, California Code of Regulations section 203(a)(1), the Chairman of the California Apprenticeship Council appointed Albert Diaz, David E. Fox, and Larry J. Uhde to act as an Appeal Board to hear and make a Proposed Decision concerning this appeal. At the hearing of this appeal, which was held on August 28, 1990, in San Francisco, California, the appellant was represented by James W. Evans, Training Director of the

Santa Clara County Electrical Joint Apprenticeship and Training Committee; respondent Gail Jesswein, Chief, Division of Apprenticeship Standards of the Department of Industrial Relations, was represented by Vera Winter Lee, counsel; and appellant was represented by Richard N. Hill and Keith Sherman of Littler, Mendelson, Fastiff & Tichy.

After hearing oral arguments and considering all written documents submitted on behalf of the parties, the Appeal Board recommends that the decision of the Chief of the Division of Apprenticeship Standards, a copy of which is attached hereto as Exhibit A and incorporated herein by reference be sustained and adopted.

DATED: Sept. 19, 1990 /s/ Albert Diaz
ALBERT DIAZ
Chairperson
Appeal Board

DATED: 9-21-90 /s/ David E. Fox
DAVID E. FOX
Member
Appeal Board

DATED: 9-25-90 /s/ Larry J. Uhde
LARRY J. UHDE
Member
Appeal Board

EXHIBIT A

STATE OF CALIFORNIA
 DEPARTMENT OF INDUSTRIAL RELATIONS
 DIVISION OF APPRENTICESHIP STANDARDS
 455 GOLDEN GATE AVENUE
 SAN FRANCISCO 94102

GEORGE DEUKMEJIAN, Governor

(Seal)

ADDRESS REPLY TO:

P.O. BOX 603

SAN FRANCISCO, CA 94101

August 15, 1989

DAS File No. 19532

District No. 06

Phone No. (415) 464-1080

Mr. Dale L. Kirkland, Executive Director
 Electronic and Communications Systems
 Joint Apprenticeship and Training Committee
 171 Mayhew Way, Suite 207
 Pleasant Hill, CA 94523

Dear Mr. Kirkland:

The new Apprenticeship Standards and Addendum Selection Procedures developed by the Electronic and Communication Systems Joint Apprenticeship Committee (JAC) for the occupation of Electronic and Communications Systems Technician, have been approved and are effective August 15, 1989. The Addendum Selection Procedures have been compared with the criteria for approval in the California Plan for Equal Opportunity and are consistent with Selection Method Number Four.

I have officially approved the Apprenticeship Standards and Selection Procedures for the Electronic and Communications Systems Joint Apprenticeship Committee.

However, Cal Code of Regulations Title 8 Section 212.2(b) states " . . . the decision of the Chief DAS regarding approval or disapproval of apprenticeship program standards shall become an Order of the California Apprenticeship Council unless an appeal as provided by subdivision (c) of this section is filed. . . . " Section 212.2(c) states " . . . the sponsor(s) of an existing program(s) may file an appeal of the decision of the Chief DAS with the California Apprenticeship Council. . . . " " . . . The Chief DAS's decision shall be the order of the Council if no appeal is filed within 30 days of the receipt of the decision by the parties. . . . " I would suggest that your JAC limit is apprenticeship activities to preliminary functions only until the approval becomes an Order of the Council.

Thank you and congratulations again.

Very truly yours,

/s/ Gail W. Jesswein
 Gail W. Jesswein, Chief
 Division of Apprenticeship Standards

GWJ:FP:rm

cc: Peter Cunha
 Deputy Chief
 Area Administrator, North
 Richey Gore
 Willie Huff, Consultant
 Program File

RICHARD N. HILL
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
650 California Street, 20th Floor
San Francisco, CA 94108-2693
Telephone: (415) 433-1940

Attorneys for Plaintiffs
DILLINGHAM CONSTRUCTION N.A., INC. and
MANUEL J. ARCEO dba SOUND SYSTEMS MEDIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DILLINGHAM CONSTRUCTION	) Case No.
N.A., INC., a California corporation,	) C 90 1272 FMS
and MANUEL J. ARCEO dba)
SOUND SYSTEMS MEDIA,	) FIRST
Plaintiffs,	) AMENDED
	) COMPLAINT
v.	) FOR
COUNTY OF SONOMA;	) DECLARATORY
DEPARTMENT OF INDUSTRIAL	) RELIEF; FOR
RELATIONS, DIVISION OF LABOR	) VIOLATION
STANDARDS ENFORCEMENT, an	) OF 42 U.S.C.
administrative agency of the State of	) § 1983; AND
California; THE DEPARTMENT OF	) TO RECOVER
INDUSTRIAL RELATIONS, DIVISION	) MONIES
OF APPRENTICESHIP STANDARDS,	) ERRONEOUSLY
an administrative agency of the State	) WITHHELD
of California; GAIL W. JESSWEIN, in	) PURSUANT
his official capacity as Chief of the	) TO
Division of Apprenticeship Standards;	) CALIFORNIA
and JAMES CURRY, in his official	) LABOR CODE
capacity as Labor Commissioner.	) § 1730
Defendants.)

Plaintiffs Dillingham Construction N.A., Inc. ("Dillingham Construction") and Manuel J. Arceo dba Sound Systems Media ("Sound Systems") complain as follows against all Defendants:

I

JURISDICTION AND VENUE

1. This Court has federal subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 2201 inasmuch as this is an action for declaratory relief involving federal questions. The federal questions involve the preemptive effect of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001, *et seq.*) and the National Labor Relations Act of 1935, as amended (29 U.S.C. § 151, *et seq.*) upon California's prevailing wage and apprenticeship statutes. Plaintiffs also allege a violation of 42 U.S.C. § 1983.

2. Venue is proper in this district pursuant to 29 U.S.C. § 1132(e) and 28 U.S.C. § 1391 in that all Defendants reside or are found within the district and the illegal acts from which Plaintiffs' claims arise were committed and had effect within the district. The Court has jurisdiction over the Fourth Cause of Action under the principles of pendent jurisdiction.

II

PARTIES

3. Plaintiff Dillingham Construction is a corporation duly organized under the laws of the State of Nevada and is authorized to do business in the State of California.

Dillingham is licensed as a contractor under the laws of the State of California. Dillingham Construction is an employer within the meaning of section 2(2) of the National Labor Relations Act (hereinafter the "NLRA") and section 1002(14) of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA").

4. Plaintiff Sound Systems is licensed as a contractor under the laws of the State of California and is engaged in the business of installing low voltage electrical systems. Sound Systems is an employer within the meaning of section 2(2) of the NLRA and section 1002(14) of ERISA.

5. Defendant County of Sonoma is a political subdivision of the State of California.

6. Defendant Department of Industrial Relations, Division of Labor Standards Enforcement is an administrative agency of the State of California and is charged with investigating and enforcing the State laws concerning, among other things, payment of prevailing wages for public works jobs.

7. Defendant James Curry in his official capacity is the acting State Labor Commissioner, who *inter alia*, is the Chief of the Division of Labor Standards Enforcement.

8. Defendant Division of Apprenticeship Standards is an administrative agency of the State of California and is charged with regulating and approving apprenticeship plans according to California law, investigating complaints concerning the operation of apprenticeship plans and enforcing the terms of such plans, including but not limited to apprenticeship standards. Defendant Gail W.

Jesswein in his official capacity, is the acting Chief of the Division of Apprenticeship Standards.

9. Defendant International Brotherhood of Electrical Workers, Local 551 (hereinafter referred to as "IBEW Local 551") is an unincorporated organization which represents and acts for its members in bargaining with employers concerning wages, hours, working conditions and other terms and conditions of employment. IBEW Local 551 is a labor organization within the meaning of section 2(5) of the NLRA and section 1002(4) of ERISA.

III

GENERAL ALLEGATIONS

10. On or about April 15, 1987, Dillingham Construction was awarded a contract by the County of Sonoma for the construction of a new Main Adult Detention Facility in Santa Rosa, California (hereinafter referred to as the "Detention Facility").

11. On or about April 20, 1987, Dillingham subcontracted certain electrical work to Southern Steel Company, Inc., who in turn subcontracted portions of the work to Elenex, Inc.

12. On or about August 15, 1987, Elenex, Inc. subcontracted the electronic installation work at the Detention Facility to Sound Systems.

13. Sound Systems began performing work on the Detention Facility on or about January 1, 1988. Sound Systems is continuing to perform work at the Detention Facility at the request of the County of Sonoma.

14. The Detention Facility project was a public works project within the meaning of section 1720 of the California Labor Code. Accordingly, Sound Systems requested a determination by the County of Sonoma regarding the appropriate prevailing rates applicable to all work performed on the Detention Facility project. On December 14, 1988, the Assistant Sonoma County Administrator determined that Sound Systems should comply with Determination C-422-X-1-88-1B pertaining to the craft of telephone installation worker and related classifications. A copy of the December 14, 1988 letter from the Assistant Sonoma County Administrator and Determination C-422-X-1-88-1B are attached hereto as Exhibit A. For all work performed on the Detention Facility project, Sound Systems paid its employees at or above the prevailing rates set forth in Determination C-422-X-1-88-1B.

15. When Sound Systems began work on the Detention Facility project, it was signatory to a collective bargaining agreement with IBEW Local 202. IBEW Local 202 is a labor organization within the meaning of section 2(5) of the NLRA. The collective bargaining agreement between Sound Systems and IBEW Local 202 included a scale of wages for apprentice electronic technicians and required Sound Systems to make contributions to the Northern California Sound and Communications Joint Apprenticeship Training Committee (hereinafter the "Northern California Sound and Communications J.A.T.C."). The Northern California Sound and Communications J.A.T.C. is an employee welfare benefit plan within the meaning of ERISA section 1002(1). Sound Systems complied with the terms of that collective bargaining agreement at all times prior to May 20, 1988.

16. On or about May 20, 1988, IBEW Local 202 withdrew its representation of the electronic technician employees of Sound Systems.

17. On or about June 1, 1988, Sound Systems entered into a new collective agreement with the National Electronic Systems Technicians Union (hereinafter referred to as "NESTU") covering its electronic technician employees. NESTU is a labor organization within the meaning of section 2(5) of the NLRA. The collective bargaining agreement between Sound Systems and NESTU contains a scale of wages for apprentice electronic technicians and requires Sound Systems to make contributions to the Electronic and Communications Systems Joint Apprenticeship and Training Trust ("Electronic and Communications Systems J.A.T.T."). The Electronic and Communications Systems J.A.T.T. is an employee welfare benefit plan within the meaning of ERISA section 1002(1). At all times subsequent to May 31, 1988, Sound Systems has complied with the terms of the NESTU collective bargaining agreement, including the apprentice wage scale and its obligation to make contributions to the Electronic and Communications Systems J.A.T.T.

18. Pursuant to California Labor Code section 1777.5, the Division of Apprenticeship Standards is authorized to approve apprenticeship training programs for apprentices employed on public works projects. On August 15, 1989, the Division of Apprenticeship Standards approved the Electronic and Communications Systems J.A.T.T. as an apprenticeship training program.

19. California Labor Code section 1777.5 provides in pertinent part as follows:

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employees workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the Joint Apprenticeship Committee administering the apprenticeship standards of the craft or trade in the area of a site for the public work for certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected; provided, however, that the approval as established by the Joint Apprenticeship Committee or Committees shall be subject to the approval of the administrator of apprenticeship.

20. On or about March 14, 1989, Defendant IBEW Local 551 filed a complaint with Division of Apprenticeship Standards against Sound Systems. A true and correct copy of that complaint is attached hereto as Exhibit B. The complaint alleged violations of Labor Code section 1777.5 insofar as it claimed that Sound Systems failed to apply for a certificate to train apprentices and failed to make training fund contributions to the Northern California Sound and Communications J.A.T.C.

21. On or about April 11, 1989, the complaint against Sound Systems was withdrawn on the grounds that the work performed by Sound Systems did not fall under the jurisdiction of the Northern California Sound and Communications J.A.T.C. A true and correct copy of that determination is attached hereto as Exhibit C. Pursuant to this determination, Sound Systems continued to

pay apprenticeship contributions to the Electronic and Communications Systems J.A.T.T.

22. On or about April 28, 1989, despite the withdrawal of the aforementioned complaint, Defendant Division of Apprenticeship Standards issued a notice of noncompliance to Plaintiffs asserting a failure by Sound Systems to request certification to train apprentices and a failure to make training fund contributions pursuant to Labor Code section 1777.5.

23. On or about October 20, 1989, Defendant Division of Labor Standards Enforcement issued a Notice To Withhold directing the County of Sonoma to withhold from Dillingham Construction the amount of \$45,103.37 based on the work performed by Sound Systems. This amount consisted of \$30,553.37 in wages allegedly owed and \$14,550.00 in penalties. Plaintiffs are informed and believe that the Notice To Withhold is based on Sound Systems' failure to make contributions to the Northern California Sound and Communications J.A.T.C. and its failure to pay journeyman wages to its apprentice electronic technicians.

FIRST CAUSE OF ACTION ERISA PREEMPTION

24. Plaintiffs repeat and reallege paragraphs 3 through 22 above and incorporate by reference said paragraphs. This cause of action is for a declaration of Plaintiffs' rights under federal law pursuant to ERISA.

25. There is an actual controversy between Plaintiffs and Defendants concerning the authority of the Division of Apprenticeship Standards and the Division of Labor

Standards Enforcement to require Sound Systems to participate in and comply with the terms of the Northern California Sound and Communications J.A.T.C. and to require Sound Systems to make fringe benefit contributions to the Northern California Sound and Communications J.A.T.C. Specifically, there is an actual controversy between Plaintiffs and Defendants concerning whether application of section 1777.5 of the California Labor Code to Sound Systems is preempted by ERISA.

26. There is an actual controversy between Plaintiffs and Defendant County of Sonoma concerning the County's participation in enforcing California Labor Code section 1777.5 penalties against Plaintiff Sound Systems Media for its failure to pay journeyman wage rates to its apprentices. Specifically, there is an actual controversy as to whether enforcement by the County of Sonoma of section 1777.5 of the California Labor Code to Sound Systems is preempted by ERISA.

27. Section 514(a) of ERISA provides in pertinent part as follows:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

28. The Northern California Sound and Communication J.A.T.C. is an employee benefit plan within the meaning of 29 U.S.C. § 1002(1).

29. Application of California Labor Code section 1777.5 to Sound Systems is preempted by ERISA because it relates to an employee benefit plan within the meaning of ERISA. Specifically, any attempt by the Division of Apprenticeship Standards, the Department of Labor Standards Enforcement, or the County of Sonoma to either force Sound Systems to participate in or make contributions to the Northern California Sound and Communications J.A.T.C. or to pay journeyman wages to its apprentices if and until the state chooses to approve Sound Systems' apprenticeship program is preempted by ERISA section 514(a).

30. Accordingly, Plaintiffs request a declaration from the Court that Defendants may not attempt to enforce California Labor Code section 1777.5 against Plaintiffs so as to require Sound Systems to participate in or make contributions to the Northern California Sound and Communications J.A.T.C.

SECOND CAUSE OF ACTION NLRA PREEMPTION

31. Plaintiffs repeat and reallege paragraphs 3 through 28 above and incorporate by reference said paragraphs. This cause of action is for a declaration of Plaintiffs' rights under federal law pursuant to the NLRA.

32. There is an actual controversy between Plaintiffs and Defendants concerning the authority of the Division of Apprenticeship Standards, the Division of Labor Standards Enforcement, and the County of Sonoma to require

Sound Systems to pay wages and fringe benefit contributions different than those set forth in its collective bargaining agreement with NESTU. Specifically there is an actual controversy between Plaintiffs and Defendants concerning whether the application of California's prevailing wage statutes against Sound Systems is preempted by the NLRA.

33. The NLRA and principles of federal supremacy preempt the authority of the Division of Apprenticeship Standards, the Division of Labor Standards Enforcement, and the County of Sonoma to enforce California's prevailing wage statutes against Sound Systems so as to require Sound Systems to pay wages and benefits to its apprentice electronic technicians in excess of those set forth in its collective bargaining agreement with NESTU.

34. The NLRA and principles of federal supremacy preempt the authority of the Division of Apprenticeship Standards, the Division of Labor Standards Enforcement, and the County of Sonoma to enforce California Labor Code section 1777.5 against Sound Systems so as to require Sound Systems to pay training/apprenticeship contributions other than those set forth in its collective bargaining agreement with NESTU.

35. Accordingly, Plaintiffs request a declaration from the Court that Defendants may not attempt to enforce California's prevailing wage statutes, including Labor Code section 1777.5, against Sound Systems so as to require Sound Systems to pay wages and benefits, including training/apprenticeship contributions, other than those contained in its collective bargaining agreement with NESTU.

THIRD CAUSE OF ACTION
VIOLATION OF 42 U.S.C. § 1983

36. Plaintiffs repeat and reallege paragraphs 3 through 33 above and incorporate by reference said paragraphs. This cause of action is for violation of 42 U.S.C. § 1983.

37. Section 1983 provides in pertinent part that:

Every person who, under color of any statute, ordinance, regulation, customs, or usage of any state . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivations of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

38. One of the rights secured by section 1983 is the right of employers and labor organizations to be free of governmental interference in the collective bargaining process. This right is granted by the NLRA and enforceable under section 1983.

39. Defendants Gail Jesswein in his official capacity as Chief of the Division of Apprentice Standards and James Curry in his official capacity as Labor Commissioner and head of the Division of Labor Standards Enforcement have violated the right of Plaintiff Sound Systems to be free of governmental interference in the collective bargaining process by, under the color of state law, attempting to force Sound Systems to participate in and contribute to the Northern California Sound and Communications J.A.T.C. and by attempting to force Sound Systems to pay wages and fringe benefits in excess

of those set forth in its collective bargaining agreement with NESTU.

40. Plaintiffs are entitled to recover compensatory damages, including attorney's fees, from Defendants in their official capacity in an amount according to proof.

FOURTH CAUSE OF ACTION RECOVERY OF MONIES ERRONEOUSLY WITHHELD

41. Plaintiffs repeat and reallege paragraphs 3 through 38 above and incorporate by reference said paragraphs. This cause of action is to recover monies erroneously withheld pursuant to Labor Code section 1730, *et seq.*

42. Under California Labor Code section 1730 *et seq.*, when James Curry in his official capacity and the Division of Labor Standards Enforcement order an awarding body to withhold money from a contractor or subcontractor based on an alleged failure to pay the required prevailing rate, the contractor or subcontractor must bring suit against the awarding body within 90 days after completion of the contract and formal acceptance of the job.

43. This complaint is timely because the County of Sonoma has claimed that the Detention Facility project has not yet been completed and thus there has been no formal acceptance of the job.

44. For the reasons set forth above in the first three causes of action, the Notice To Withhold issued by James Curry in his official capacity and the Division of Labor Standards Enforcement to the County of Sonoma is

invalid on the grounds that it is preempted by ERISA, preempted by the NLRA and is a violation of 42 U.S.C. § 1983.

45. In addition, Sound Systems was entitled to rely and did rely on the determination by the Assistant Sonoma County Administrator that Determination C-422-X-1-88-1B applied to all work performed by Sound Systems on the Detention Facility project. In the absence of clear error, bad faith or fraud, none of which are present in this case, James Curry in his official capacity and the Division of Labor Standards Enforcement were required to accept the classification chosen by the County of Sonoma. This policy was announced by the State Labor Commissioner in Interpretive Bulletin 87-2, a copy of which is attached as Exhibit D.

46. Accordingly, Plaintiffs request that the Court order James Curry in his official capacity and the Division of Labor Standards Enforcement to rescind the Notice To Withhold issued in Case No. 31-01303 and order the County of Sonoma to release to Dillingham the sum of \$45,103.37 withheld pursuant to that Notice To Withhold.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

1. That the Court enter a declaratory judgment that Defendants may not enforce California Labor Code section 1777.5 so as to require Sound Systems to participate

in or make contributions to the Northern California Sound and Communications J.A.T.C.;

2. That the Court enter a declaratory judgment that Defendants may not enforce California's prevailing wage statutes, including Labor Code section 1777.5, so as to require Sound Systems to pay wages and fringe benefits, including training/apprenticeship contributions, different than those set forth in the collective bargaining agreement between Sound Systems and NESTU;

3. That Plaintiffs be awarded compensatory damages according to proof;

4. That the County of Sonoma be ordered to release to Dillingham Construction the sum of \$45,103.37 withheld pursuant to the Notice To Withhold in Case No. 31-01303;

5. That Plaintiffs be awarded their attorney's fees and costs of suit incurred in prosecuting this action; and

6. That Plaintiffs be awarded such other and further relief as the Court deems just and proper.

DATED: November 30, 1990

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
RICHARD N. HILL

By: /s/ Keith M. Sherman
KEITH M. SHERMAN

Attorneys for Plaintiffs
DILLINGHAM CONSTRUCTION N.A., INC.
and MANUEL J. ARCEO dba
SOUND SYSTEMS MEDIA

John M. Rea, Chief Counsel
Department of Industrial Relations
400 Oyster Point Blvd., Wing C, Ste. 504
So. San Francisco, CA 94080
Telephone: (415) 737-2900
Attorney for Defendant
Department of Industrial Relations,
Division of Apprenticeship Standards

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DILLINGHAM CONSTRUCTION
N.A., INC., a California
corporation, and MANUEL J.
ARCEO dba SOUND SYSTEMS
MEDIA,

Plaintiffs,

vs.

COUNTY OF SONOMA;
DEPARTMENT OF INDUSTRIAL
RELATIONS, DIVISION OF
LABOR STANDARDS
ENFORCEMENT, an administrative
agency of the State of California;
THE DEPARTMENT OF
INDUSTRIAL RELATIONS,
DIVISION OF APPRENTICESHIP
STANDARDS, an administrative
agency of the State of California;
and INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 551,
Defendants.

CASE NO. C 90
1272 FMS

ANSWER TO THE
FIRST AMENDED
COMPLAINT FOR
DECLARATORY
RELIEF

(Filed
Dec. 21, 1990)

COMES NOW, defendant DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF APPRENTICESHIP STANDARDS, and on behalf of itself alone, answers the complaint as follows:

1. Defendant denies, generally and specifically, each and every allegation contained with Paragraph 1 of the complaint.

2. Answering Paragraphs 2, 3, and 4, defendant has insufficient information or belief with which to answer the allegations contained within these Paragraphs of the complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

3. Answering Paragraphs 5, 6, and 9, defendant admits the allegations.

4. Defendant admits the allegation contained within Paragraph 7 of the complaint.

5. Answering Paragraph 8, defendant denies that it enforces the terms of apprenticeship plans, contends that it acts under state and federal law to approve program sponsors who train apprentices under standards, when such program sponsors voluntarily seek such approval. Except for such denial, defendant admits the remaining allegations of Paragraph 8.

6. Defendant admits the allegation contained within Paragraph 9 of the complaint.

GENERAL ALLEGATIONS

7. Answering Paragraphs 10, 11, 12, and 13, defendant has insufficient information or belief with which to

answer the allegations contained within such Paragraphs of the complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

8. Defendant denies each and every allegation contained within Paragraph 14 of the complaint; except admits that the Detention Facility project was a public works project within the meaning of section 1720 of the California Labor Code. Defendant admits that a copy of the letter of December 14, 1988 is attached as Exhibit A to the complaint.

9. Answering Paragraphs, 15, 16, and 17, defendant has insufficient information or belief with which to answer the allegations contained within such Paragraphs of the complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

10. In response to Paragraph 18, admits only that the California Apprenticeship Council, as a "state approved council" within the meaning of 29 C.F.R. § 29, and the National Apprenticeship Act, 20 U.S.C. § 50, approves program for federal and state purposes, and that the Chief of the Division of Apprenticeship exercises this authority under Chapter 4 of Division 3 of the California Labor Code. Pursuant to 8 California Code of Regulations section 212.2, such an approval by the Chief becomes an order of the California Apprenticeship Council unless appealed. An approval letter was issued August 15, 1989, but did not become a final order of the Council because a timely appeal was filed, which is still

pending. Except as set forth above, defendant denies the allegations of Paragraph 18.

11. Defendant denies the legal relevance of pertinence of a partial quotation contained within Paragraph 19 of the complaint but admits that California Labor Code section 1777.5 reads in part as quoted.

12. In response to Paragraph 20, admit.

13. In response to Paragraph 21, deny that the letter attached as Exhibit C is a "determination" rather than a letter notifying a party of withdrawal of a complaint, admit that the letter is true and authentic, and speaks for itself. Otherwise, defendant has insufficient information or belief with which to answer the allegations contained within such Paragraphs of the complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

14. In response to Paragraph 22, admit that a Form N-614 Notice of Non-Compliance was issued, that it was based on the April 3, 1989 complaint, and further that it was based on the determination of the Bureau of Field Enforcement of the Division of Labor Standards Enforcement's classification of work, and the representation of Mr. Arceo in an April 20, 1990 meeting that the work was sound communication work. No action is or has been taken on the complaint pending resolution of the classification issue. Otherwise, deny.

15. Defendant denies each and every allegation contained within Paragraph 23 of the complaint; excepts admits that on or about October 20, 1989, co-defendant DLSE filed a Notice to Withhold with the County of

Sonoma in the sum of \$45,103.37 which represents the sum of \$30,553.37 in unpaid wages plus \$14,500.00 in penalties, and affirmatively alleges that on or about October 25, 1989, co-defendant DLSE filed another Notice to Withhold with the County of Sonoma in the sum of \$4,082.25, which represents \$2,082.25 in unpaid wages plus \$2,000.00 in penalties.

FIRST CAUSE OF ACTION

16. In response of Paragraph 24, defendant incorporates hereto Paragraphs 1 through 15, inclusive, of its answers as if fully set forth herein.

17. Responding to Paragraph 25, defendant denies each and every allegation contained within Paragraph 25 of the complaint.

18. Responding to Paragraph 26, deny.

19. Responding to Paragraph 27, admits that the partial quotation for section 514(a) of ERISA is accurate.

20. Defendant has insufficient information or belief as to the status of the JATC, and on that ground denies each and every allegation contained within Paragraph 28 of the complaint.

21. Responding to Paragraphs 29 and 30, defendant denies each and every allegation contained with Paragraphs 29 and 30 of the complaint.

SECOND CAUSE OF ACTION

22. Responding to Paragraph 31, defendant incorporates hereto Paragraphs 1 through 21, inclusive, of its answers as if fully set forth above.

23. Responding to Paragraphs 32, 33, 34, and 35, defendant denies each and every allegation contained within those Paragraphs of the complaint.

THIRD CAUSE OF ACTION

24. Responding to Paragraph 36, defendant incorporates hereto Paragraphs 1 through 23, inclusive, of its answer as if fully set forth herein.

25. Responding to Paragraph 37, admits that 42 U.S.C. § 1983 reads as quoted.

26. Responding to Paragraphs 38, 39, and 40, defendant denies each and every allegation contained within those Paragraphs of the complaint.

FOURTH CAUSE OF ACTION

27. Responding to Paragraph 41, defendant incorporates hereto Paragraphs 1 through 26, inclusive, of its answer as if fully set forth herein.

28. Responding to Paragraph 42, admit that Labor Code section 1730 speaks for itself, otherwise denies.

29. Responding to Paragraph 43, defendant has insufficient information or belief with which to answer

the allegations contained within Paragraph 43 of the complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

30. Defendant denies each and every allegation contained within Paragraph 44 of the complaint.

31. Responding to Paragraph 45, admits that a true copy of Interpretive Bulletin 87-2 is Exhibit D, but otherwise is without information or belief with which to answer the allegations contained within such Paragraphs of the complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

32. Responding to Paragraph 46, defendant denies each and every allegation contained within Paragraph 46 of the complaint.

FIRST AFFIRMATIVE DEFENSE

Fails to state a claim upon which relief can be granted as to the Division of Apprenticeship Standards.

SECOND AFFIRMATIVE DEFENSE

Plaintiff has failed to join a necessary party, the Joint Apprenticeship Training Committee, as to which it seeks a declaration that the JATC's right to contributions, and training for the JATC's apprentices, are preempted based on the JATC's alleged status as a "plan" under ERISA.

THIRD AFFIRMATIVE DEFENSE

Commencement of state enforcement proceedings before the filing of this action makes *Younger* abstention mandatory.

FOURTH AFFIRMATIVE DEFENSE

Because the Division of Apprenticeship Standards has suspended proceedings on its Notice of Non-Compliance pending resolution of any classification issue, there is no present case or controversy, and plaintiff lacks standing to pursue declaratory or other relief.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff has (Paragraph 45; Exhibit D to complaint) put in issue under state law the propriety of state defendants' enforcement of classifications other than chosen by Sonoma, making *Pullman* abstention appropriate.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff has failed to exhaust administrative remedies in two ways. First, it has failed to take any steps to exhaust its right to California Apprenticeship Council resolution of the appeal of its apprenticeship program as an approved program. Second, in the alternative, if there is a live controversy over the Notice of Non-Compliance it has failed to exhaust the administrative appeal of the Notice of Non-Compliance, which it could have secured by requesting that the now dormant complaint be brought before the CAC.

SEVENTH AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over the Claims for Relief.

EIGHTH AFFIRMATIVE DEFENSE

As to the Third Cause of Action for interference with plaintiff's collective bargaining relationship with NESTU, the complaint fails to either join NESTU as a party necessary for relief or explain why joinder is not necessary.

NINTH AFFIRMATIVE DEFENSE

As to the Fourth Claim for Relief, plaintiff has misjoined other claims for relief with state causes of action for recoveries of monies, whose right to recovery is specifically conditioned on the general contractor's action being maintained solely on those grounds.

TENTH AFFIRMATIVE DEFENSE

Fails to join necessary and indispensable party, the employers' JATC apprentices and the employer association which makes up half of the JATC, who have interests in state recognition on state public works, and in paying apprentices below the prevailing rate on state public works, both of which would fall to ERISA preemption if plaintiff succeeds.

ELEVENTH AFFIRMATIVE DEFENSE

Fails to join the Secretary of Labor as a necessary and indispensable party in a suit under ERISA, to declare

invalid and enjoin the state enforcement of state laws given regulatory and contractual approval by the Secretary for apprenticeship programs in California.

TWELFTH AFFIRMATIVE DEFENSE

Fails to state a claim because both NLRA and ERISA preemption, as to which declaratory relief is sought, are anticipatory defenses to a state civil proceeding commenced by the Notice to Withhold.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs lack standing to raise defenses as to apprenticeship because they cannot show that any person employed at the time was an apprentice meeting any definition under any federal or state labor law standards.

FOURTEENTH AFFIRMATIVE DEFENSE

Claims for compensatory damages, except attorneys fees are barred by the Eleventh Amendment.

The complaint should be dismissed pursuant to *Younger* abstention because it was filed after the commencement of state proceedings by the Notice to Withhold.

WHEREFORE, defendant prays for judgment against plaintiffs as follows:

1. For dismissal of all Claims for Relief;
2. For costs of suit and attorneys fees herein; and

3. For such other and further relief as the Court may deem just and proper.

DATED: December 21, 1990

/s/ Raoul M. Thorbourne
JOHN M. REA, Chief Counsel
RAOUL M. THORBOURNE,
Counsel
 Attorneys for Defendant
 Division of Apprenticeship
 Standards

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

BY: RAMON YUEN-GARCIA, Attorney
30 Van Ness Avenue, Suite 4400
San Francisco, California 94102
Telephone: (415) 557-2516

Attorney for Defendant
COUNTY OF SONOMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DILLINGHAM CONSTRUCTION)	
N.A., INC., a California corporation,)	
and MANUEL J. ARCEO dba	)	NO. C 90 1272 FMS
SOUND SYSTEMS MEDIA,)	
)	
Plaintiffs,	)	ANSWER OF
	)	COUNTY OF
vs.	)	SONOMA TO
COUNTY OF SONOMA;	)	FIRST AMENDED
DEPARTMENT OF INDUSTRIAL	)	COMPLAINT
RELATIONS, DIVISION OF)	
LABOR STANDARDS)	
ENFORCEMENT, an administrative)	
agency of the State of California;)	
THE DEPARTMENT OF)	
INDUSTRIAL RELATIONS,)	
DIVISION OF APPRENTICESHIP)	
STANDARDS, an administrative)	
agency of the State of California;)	
GAIL W. JESSWEIN, in his official)	
capacity as Chief of the Division)	
of Apprenticeship Standards; and)	
JAMES CURRY, in his official)	
capacity as Labor Commissioner.)	
)	
Defendants.)	

COMES NOW, defendant COUNTY OF SONOMA, and severing itself from the other named defendants and on behalf of itself alone, answers the first amended complaint as follows:

1. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 1 of the first amended complaint.

2. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 2 of the first amended complaint.

3. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 3 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein; except admits that defendant DILLINGHAM CONSTRUCTION N.A., INC. is a corporation and licensed contractor under the laws of the State of California.

4. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 4 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

5. Defendant admits the allegation contained within Paragraph 5 of the first amended complaint.

6. Defendant admits the allegation contained within Paragraph 6 of the first amended complaint.

7. Defendant admits the allegation contained within Paragraph 7 of the first amended complaint.

8. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 8 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

9. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 9 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

GENERAL ALLEGATIONS

10. Defendant admits the allegations contained within Paragraph 10 of the first amended complaint.

11. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 11 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

12. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 12 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

13. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 13 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein; and further denies that

SOUND SYSTEMS is continuing to perform work at the Detention Facility at the request of defendant.

14. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 14 of the first amended complaint; except admits that the Detention Facility Project was a public works project within the meaning of section 1720 of the California Labor Code. Defendant further denies that a copy of the letter of December 14, 1988 is, attached as Exhibit A to the first amended complaint, and served on defendant.

15. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 15 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

16. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 16 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

17. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 17 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

18. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 18 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

19. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 19 of the first amended complaint; except admits that California Labor Code, Section 1777.5 reads what it reads.

20. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 20 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein; and further denies that a copy of the first amended complaint filed by IBEW Local 551 with the Division of Apprenticeship Standards is attached as Exhibit B to the first amended complaint, and served on defendant.

21. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 21 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein; and further denies that a copy of the determination is attached as Exhibit C to the first amended complaint, and served on defendant.

22. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 22 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

23. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 23 of the first amended complaint; excepts admits that on or about October 20, 1989, the Division of Labor Standards Enforcement filed a Notice to Withhold with defendant

County of Sonoma in the sum of \$45,103.37 which represents the sum of \$30,553.37 in unpaid wages plus \$14,550.00 in penalties, and affirmatively alleges that on or about October 25, 1989, the Division of Labor Standards Enforcement filed another Notice to Withhold with defendant County of Sonoma in the sum of \$4,082.25 which represents \$2,082.25 in unpaid wages plus \$2,000.00 in penalties.

FIRST CAUSE OF ACTION

24. Defendant incorporates hereto Paragraphs 3 through 22, inclusive, of its answers as if fully set forth herein, and further denies, generally and specifically, each and every allegation contained therein.

25. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 25 of the first amended complaint.

26. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 26 of the first amended complaint.

27. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 27 of the first amended complaint; except admits that Section 514(a) of ERISA reads what it reads.

28. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 28 of the first amended complaint.

29. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 29 of the first amended complaint.

30. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 30 of the first amended complaint.

SECOND CAUSE OF ACTION

31. Defendant incorporates hereto Paragraphs 3 through 28, inclusive, of its answers as if fully set forth herein, and further denies, generally and specifically, each and every allegation contained therein.

32. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 32 of the first amended complaint.

33. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 33 of the first amended complaint.

34. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 34 of the first amended complaint.

35. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 35 of the first amended complaint.

THIRD CAUSE OF ACTION

36. Defendant incorporates hereto Paragraphs 3 through 33, inclusive, of its answers as if fully set forth herein, and further denies, generally and specifically, each and every allegation contained therein.

37. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 37

of the first amended complaint; except admits that 42 U.S.C. §1983 reads what it reads.

38. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 38 of the first amended complaint.

39. Defendant has insufficient information or belief with which to answer the allegations contained within Paragraph 39 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein.

40. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 40 of the first amended complaint.

FOURTH CAUSE OF ACTION

41. Defendant incorporates hereto Paragraphs 3 through 38, inclusive, of its answers as if fully set forth herein, and further denies, generally and specifically, each and every other allegation contained therein.

42. Defendant denies, generally and specifically, each and every allegation contained in Paragraph 42 of the first amended first amended complaint; except admit that California Labor Code, Sections 1730 et seq., read what they read.

43. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 43 of the first amended complaint.

44. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 44 of the first amended complaint.

45. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 45 of the first amended complaint or that a copy of Interpretive Bulletin 87-2 is attached to the first amended complaint as Exhibit D and served on defendant.

46. Defendant denies, generally and specifically, each and every allegation contained within Paragraph 46 of the first amended complaint.

AFFIRMATIVE DEFENSES

1. The first amended complaint fails to state a claim against defendant upon which relief can be granted.

2. Plaintiffs may not base their claim for relief on the provisions of the California Labor Code and at the same time challenge the same statutory provisions.

3. Plaintiff, MANUEL J. ARCEO dba SOUND SYSTEMS MEDIA, has no standing in his claim for relief to recover the funds withheld pursuant to the Notices to Withhold under the provisions of the California Labor Code.

4. Plaintiff, MANUEL J. ARCEO dba SOUND SYSTEMS MEDIA, is not in privity of contract with defendant.

5. Under the provisions of California Labor Code, Section 1733, the action to recover the funds withheld by the County of Sonoma on the public works project known

as the Main Adult Detention Facility, under the Notices to Withhold filed by the DIVISION OF LABOR STANDARDS ENFORCEMENT, is the exclusive remedy of plaintiff, DILLINGHAM CONSTRUCTION N.A., INC. or its assignee.

6. The provisions of both California Labor Code, Sections 1733 and 1775, provide that the burden of proof is upon the plaintiff, DILLINGHAM CONSTRUCTION N.A., INC. to show that the money withheld by the defendant or which the DIVISION OF LABOR STANDARDS ENFORCEMENT contends is due is not owed.

7. No other issues may be included in the action to recover the funds withheld pursuant to the Notices to Withhold filed by the DIVISION OF LABOR STANDARDS ENFORCEMENT under the provisions of California Labor Code, Section 1733.

8. Claims for relief relating to Declaratory Relief, ERISA and NLRA PREEMPTIONS, and Violation of 42 U.S.C. §1983, may not be included in the claim for relief for the Recovery of Penalties and Forfeitures under the provisions of California Labor Code, Section 1733.

9. The court has no authority to review the proprietary functions of the State.

10. The letting of public contracts is the exercise of the State reserved powers and are protected under the Tenth Amendment of the United States Constitution.

11. The enactment of the State prevailing wage law is not an exercise of the State's general regulatory powers.

12. The prevailing wage law is a minimum standard, and the interpretation of the statute by the State's highest court is conclusive upon the federal courts.

13. Plaintiffs' right are not impinged upon under 42 U.S.C. §1983.

14. Defendant has faithfully discharged all its obligations under the contract and the statutory provisions as required by law.

15. Defendant has not waived any of its statutory rights nor the rights under the contract with DILLINGHAM CONSTRUCTION N.A., INC.

16. Plaintiff, DILLINGHAM CONSTRUCTION N.A., INC. has failed to discharge all its obligations under the contract or complied with all statutory provisions.

17. Plaintiffs have violated and failed to comply with the procedural requirements of the statutory provisions relating to the California prevailing wage laws.

18. Plaintiffs are not entitled to any of the funds withheld by defendant.

19. All disputes relating to the public works contract and the bonds issued by The American Insurance Company and Fireman's Fund Insurance Company are subject to arbitration.

20. Defendant is required by law to withhold the funds upon the filing of the Notice to Withhold by the DIVISION OF LABOR STANDARDS ENFORCEMENT.

21. Defendant has not misled, misrepresented, or made any representations or statements with respect to

any statutory or contractual rights or obligations upon which plaintiffs or either plaintiff relied to their, its or his detriment.

WHEREFORE, defendant prays that plaintiffs take nothing for their first amended complaint, and that defendant be awarded attorney's fees and costs of suit herein, and for such other and further relief as the Court may deem just and proper.

DATED: January 23, 1991

/s/ Ramon Yuen-Garcia
RAMON YUEN-GARCIA
 Attorney for Defendant
 COUNTY OF SONOMA

DIVISION OF LABOR STANDARDS ENFORCEMENT
 Department of Industrial Relations
 State of California
 BY: RAMON YUEN-GARCIA, Attorney
 30 Van Ness Avenue, Suite 4400
 San Francisco, California 94102
 Telephone: (415) 557-2516

Attorney for Defendants DIVISION
 OF LABOR STANDARDS ENFORCEMENT
 and JAMES CURRY, Labor Commissioner

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

DILLINGHAM CONSTRUCTION N.A.,)
 INC., a California corporation, and)
 MANUEL J. ARCEO dba SOUND)
 SYSTEMS MEDIA,)
 Plaintiffs,)

vs.)

COUNTY OF SONOMA; DEPARTMENT)
 OF INDUSTRIAL RELATIONS,)
 DIVISION OF LABOR STANDARDS)
 ENFORCEMENT, an administrative)
 agency of the State of California; THE)
 DEPARTMENT OF INDUSTRIAL)
 RELATIONS, DIVISION OF)
 APPRENTICESHIP STANDARDS, an)
 administrative agency of the State of)
 California; GAIL W. JESSWEIN, in his)
 official capacity as Chief of the)
 Division of Apprenticeship Standards;)
 and JAMES CURRY, in his official)
 capacity as Labor Commissioner.)

Defendants.)

NO. C 90
 1272 FMS

ANSWER TO
 FIRST
 AMENDED
 COMPLAINT

COMES NOW, defendants DIVISION OF LABOR STANDARDS ENFORCEMENT and JAMES CURRY, Labor Commissioner, and severing itself from the other named defendants and on behalf of themselves, answers the first amended complaint as follows:

1. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 1 of the first amended complaint.

2. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 2 of the first amended complaint.

3. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 3 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

4. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 4 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

5. Defendants admit to the allegations contained within Paragraph 5 of the first amended complaint.

6. Defendants admit to the allegations contained within Paragraph 6 of the first amended complaint.

7. Defendants admit to the allegations contained within Paragraph 7 of the first amended complaint.

8. Defendants admit to the allegations contained within Paragraph 8 of the first amended complaint.

9. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 9 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

GENERAL ALLEGATIONS

10. Defendants admit to the allegations contained within Paragraph 10 of the first amended complaint.

11. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 11 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

12. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 12 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

13. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 13 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

14. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 14 of the first amended complaint; except admit that the Detention Facility Project was a public works project within the meaning of section 1720 of the California Labor Code. Defendants further deny that a copy of the

letter of December 14, 1988 is attached as Exhibit A to the complaint and served on defendants.

15. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 15 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

16. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 16 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

17. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 17 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

18. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 18 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein; except admit that the Division of Apprenticeship Standards is authorized to approve apprenticeship training programs.

19. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 19 of the first amended complaint; except admit that California Labor Code, Section 1777.5 reads what it reads.

20. Defendants have insufficient information or belief with which to answer the allegations contained

within Paragraph 20 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein; and further deny that a copy of the complaint filed by IBEW Local 551 with the Division of Apprenticeship Standards is attached as Exhibit B to the first amended complaint, and served on defendants.

21. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 21 of the first amended complaint, and on that ground denies, generally and specifically, each and every allegation contained therein; and further denies that a copy of the determination is attached as Exhibit C to the first amended complaint, and served on defendants.

22. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 22 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

23. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 23 of the first amended complaint; excepts [sic] admit that on or about October 20, 1989, defendants filed a Notice to Withhold with the County of Sonoma in the sum of \$45,103.37 which represents the sum of \$30,553.37 in unpaid wages plus \$14,550.00 in penalties, and affirmatively allege that on or about October 25, 1989, defendants filed another Notice to Withhold with the County of Sonoma in the sum of \$4,082.25 which represents \$2,082.25 in unpaid wages plus \$2,000.00 in penalties.

FIRST CAUSE OF ACTION

24. Defendants incorporate hereto Paragraphs 1 through 24, inclusive, of their foregoing answers as if fully set forth herein.

25. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 25 of the first amended complaint.

26. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 26 of the first amended complaint.

27. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 27 of the first amended complaint; except admits that Section 514(a) of ERISA reads what it reads.

28. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 28 of the first amended complaint.

29. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 29 of the first amended complaint.

30. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 30 of the first amended complaint.

SECOND CAUSE OF ACTION

31. Defendants incorporate hereto Paragraphs 3 through 28, inclusive, of their foregoing answers as if fully set forth herein.

32. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 32 of the first amended complaint.

33. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 33 of the first amended complaint.

34. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 34 of the first amended complaint.

35. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 35 of the first amended complaint.

THIRD CAUSE OF ACTION

36. Defendants incorporate hereto Paragraphs 3 through 33, inclusive, of their foregoing answers as if fully set forth herein; and further deny each and every allegation contained therein.

37. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 37 of the first amended complaint; except admit that 42 U.S.C. §1983 reads what it reads.

38. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 38 of the first amended complaint.

39. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 39 of the first amended complaint.

40. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 40 of the first amended complaint.

41. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 41 of the first amended complaint.

FOURTH CAUSE OF ACTION

42. Defendants incorporate hereto Paragraphs 3 through 38, inclusive, of their foregoing answers as if fully set forth herein.

43. Defendants deny, generally and specifically, each and every allegation contained in Paragraph 43 of the first amended complaint; except admit that California Labor Code, Sections 1730 et seq., read what they read.

44. Defendants have insufficient information or belief with which to answer the allegations contained within Paragraph 44 of the first amended complaint, and on that ground deny, generally and specifically, each and every allegation contained therein.

45. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 45 of the first amended complaint.

46. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 46 of the first amended complaint or that a copy of Interpretive Bulletin 87-2 is attached to the first amended complaint as Exhibit D and served on defendants.

47. Defendants deny, generally and specifically, each and every allegation contained within Paragraph 47 of the first amended complaint.

WHEREFORE, defendants pray that plaintiffs take nothing for their first amended complaint, and that defendants be awarded attorney's fees and costs of suit herein, and for such other and further relief as the Court may deem just and proper.

AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

1. The first amended complaint fails to state a claim against defendants upon which relief can be granted.

2. Plaintiffs may not base their claims for relief on the provisions of the California Labor Code and at the same time challenge the same statutory provisions.

3. Plaintiff, MANUEL J. ARCEO dba SOUND SYSTEMS MEDIA, has no standing in his claim for relief to recover the funds withheld pursuant to the Notices to Withhold under the provisions of the California Labor Code.

4. Plaintiff, MANUEL J. ARCEO dba SOUND SYSTEMS MEDIA, is not in privity of contract with the County of Sonoma.

5. Under the provisions of California Labor Code, Section 1733, the action to recover the funds withheld by the County of Sonoma on the public works project known as the Main Adult Detention Facility, under the Notices to Withhold filed by the DIVISION OF LABOR STANDARDS ENFORCEMENT, is the exclusive remedy of

plaintiff, DILLINGHAM CONSTRUCTION N.A., INC. or its assignee.

6. The provisions of both California Labor Code, Sections 1733 and 1775, provide that the burden of proof is upon plaintiff, DILLINGHAM CONSTRUCTION N.A., INC., to show that the money withheld by the County of Sonoma or which defendants contends is due, is not owed.

7. No other issues may be included in the action to recover the funds withheld pursuant to the Notices to Withhold filed by the DIVISION OF LABOR STANDARDS ENFORCEMENT, under the provisions of California Labor Code, Section 1733.

8. Claims for relief relating to Declaratory Relief, ERISA and NLRA PREEMPTIONS, and Violation of 42 U.S.C. §1983, may not be included in the claim for relief for the Recovery of Penalties and Forfeitures under the provisions of California Labor Code, Section 1733, and the court is without jurisdiction to hear the Fourth Claim for Relief.

9. The court has no authority to review the proprietary functions of the State.

10. The letting of public contracts is the exercise of the State reserved powers and are protected under the Tenth Amendment of the United States Constitution.

11. The enactment of the State prevailing wage law is not an exercise of the State's general regulatory powers.

12. The prevailing wage law is a minimum standard, and the interpretation of the statute by the State's highest court is conclusive upon the federal courts.

13. Plaintiffs' right are not impinged upon under 42 U.S.C. §1983.

14. Defendants have complied with all statutory provisions as required by law.

15. Defendants have not waived any of its statutory rights.

16. Plaintiff, DILLINGHAM CONSTRUCTION N.A., INC. has failed to discharge all its obligations under the contract with the County of Sonoma.

17. Plaintiffs have violated and failed to comply with the procedural requirements of the statutory provisions relating to the California prevailing wage laws.

18. Plaintiffs are not entitled to any of the funds withheld by the County of Sonoma.

19. Defendants have not misled, misrepresented, or made any representations or statements with respect to any statutory or contractual rights or obligations upon which plaintiffs or either plaintiff relied to their, its or his detriment.

20. Defendants are entitled to judgment to the counterclaims of the Division of Labor Standards Enforcement as set forth in the Division's initial answer to the complaint.

WHEREFORE, defendants further pray for judgment against plaintiffs on the Division of Labor Standards

Enforcement's counterclaim for relief pleaded in its initial answer as follows:

1. Judgment in the sum of \$32,635.62 for wages, plus interest at the legal rate pursuant to Civil Code, Section 3287, and the sum of \$16,550.00 for penalties, or according to proof, as and against DILLINGHAM CONSTRUCTION N.A., INC.;

2. Judgment in the sum of \$30,553.37 for wages, plus interest at the legal rate pursuant to Civil Code, Section 3287, and the sum of \$14,550.00 for penalties, or according to proof, as and against MANUEL J. ARCEO, individually and doing business as SOUND SYSTEMS MEDIA;

3. That the County of Sonoma pay said wages, interest and penalties over to defendants for payment to the workers and the Treasurer of the State of California, out of the funds being withheld by the County of Sonoma under the public works contract herein, prior to the payment of any claim allegedly due in the instant action or hereinafter claimed to be due by any other party;

4. For costs of suit and attorney's fees herein; and

5. For such other and further relief as the Court may deem just and proper.

DATED: January 23, 1991

/s/ Ramon Yuen-Garcia
RAMON YUEN-GARCIA
 Attorney for Defendants
 JAMES CURRY and DIVISION OF
 LABOR STANDARDS ENFORCEMENT

JUN 17 1996

In The
Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS, COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.;
MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

JOHN M. REA, Chief Counsel
(Counsel of Record)
VANESSA L. HOLTON
Asst. Chief Counsel
FRED D. LONSDALE, Sr. Counsel
JAMES D. FISHER, Counsel
SARAH COHEN, Counsel

State of California
Department of Industrial
Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105

(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 972-8900

*Counsel for State Petitioners
Department of Industrial
Relations Division of
Apprenticeship Standards*

H. THOMAS CADELL, JR.
Chief Counsel
RAMON YUEN-GARCIA
Counsel

State of California
Division of Labor
Standards Enforcement
45 Fremont Street,
Suite 3220
San Francisco, CA 94105

(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 975-2060

*Counsel for State
Petitioners Division of
Labor Standards
Enforcement and County
of Sonoma*

62 Pp

QUESTION PRESENTED

Whether Congress intended, in enacting the Employee Retirement Income Security Act, to preempt states' traditional regulation of wages, apprenticeship and state-funded public works construction when that regulation is expressed in a state prevailing wage law that restricts contractors' payment of lower apprentice-specific wages to apprentices duly registered in programs approved as meeting federal standards.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 57 F.3d 712 (9th Cir. 1995) and is reprinted in the appendix to the Petition for Writ of Certiorari ("Pet. App.") at Pet. App. 1-22. The order of the Court of Appeals denying California's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at Pet. App. 53-54. The opinion of the United States District Court for the Northern District of California granting California's Motion for Summary Judgment is reported at 778 F. Supp. 1522 (N.D. Cal. 1991) and is reprinted at Pet. App. 23-52.

JURISDICTION

The Ninth Circuit issued its decision and judgment on June 7, 1995. After denial of a Petition for Rehearing and Suggestion for Rehearing En Banc, Pet. App. 53-54, and an extension of time to file a Petition for Writ of Certiorari ("Cert. Pet."), certiorari was granted on April 15, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(l) (1994).

STATUTES INVOLVED

The relevant federal statutory provisions are sections 514(a) and (d), 29 U.S.C. §§ 1144(a) and 1144(d) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1994), and the National Apprenticeship ("Fitzgerald") Act, 29 U.S.C. § 50 (1994). The relevant California statutory provision is

California Labor Code section 1777.5 (West Supp. 1996). The relevant statutes are reproduced at Pet. App. 55-63.

STATEMENT OF THE CASE

This case concerns the question of whether California may, consistent with the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1994), continue its long-time practice of limiting an apprentice wage on state funded public works to those workers who are registered apprentices in approved apprenticeship programs. Although apprenticeship has existed in America since colonial times, this Court has had little occasion to adjudicate issues concerning this venerable institution. Because this is not an area the Court has frequented, some background on the legal status of apprenticeship is useful in understanding the context of this action.

I. The Traditional State Role Through The End Of The Craft Era Was To Enforce The Predecessor Of The Modern Apprentice's "Written Agreement."

Although under common law, the traditional contractual relationship between master and apprentice was personal and bilateral, some terms of that relationship, unlike other private arrangements, became regulated by public law early in English legal history. The English Statute of Artificers (1563) addressed the length of an apprenticeship, setting it at seven years. W.J. RORABAUGH, *THE CRAFT APPRENTICE: FROM FRANKLIN TO THE MACHINE AGE IN AMERICA* 4 (1986). English apprenticeship thereafter moved from a relationship between parent and master

based on private custom to a public or quasi-public affair falling under the control of municipal authorities or guilds. O.J. DUNLOP AND R.C. DENMAN, *ENGLISH APPRENTICESHIP AND CHILD LABOR* 30 (1912). Inheriting this craft apprenticeship tradition with the common law, the colonies, and later the states, enforced the apprentice's obligation to serve the indentured time, as well as the master's obligation to train, care for, and protect the apprentice. 1 GRACE ABBOTT, *THE CHILD AND THE STATE* 216-18 (1938).

In the first decades of this century, apprenticeship evolved away from a private, albeit state-regulated, two-sided master-apprentice relationship. The apprentice no longer subsisted in the quarters of his master but lived as an independent and mobile wage-earner, with the schedule of skills he was to learn being specified by trade-associations rather than individual masters, and with a role for public authority, limited mainly to that of providing classroom instruction in the theory of the trade. STEWART SCRIMSHAW, *APPRENTICESHIP: PRINCIPLES, RELATIONSHIPS, PROCEDURES* 8 (table) (1932). With industrialization, the states began to realize that in a system lacking individual masters, neither employer nor potential apprentice could assess whether apprentices were acquiring the needed skills. While greater employer investment in labor skills was needed as industrialization demanded higher skills, labor mobility hampered that investment. A single employer could not follow each apprentice's progress to be sure all necessary skills were learned. *Id.* at 66-67 (discussing difficulties among construction employers in interchange).

The newly mobile potential apprentice, on the other hand, was faced with problems as well: There was no

protection against placement of "apprentices" in dead end, low-wage jobs that did not deliver training, nor was there any assurance that training would include the theory, as well as the manual skills, necessary to produce a fully trained mechanic.¹ Both employer and apprentice concerns could be met if involved employers worked through their trade associations to formulate standards of apprenticeship in cooperation with both organized labor and public authorities.² Such standards would include uniform wage scales and the "necessary related science of the trade," as well as certification by means of a diploma. SCRIMSHAW, *supra*, at 63.

The remedies for these labor market difficulties produced a change in the state role in the 1920's. The states were joined and encouraged by the federal government in the 1930's in defining an apprentice and protecting apprenticeship opportunities.

The need to create a federal definition of an apprentice arose when the federal government attempted to

¹ One commentator at the time labeled the first form of misuse of apprenticeship "exploitation" and the second "fake" apprenticeship. SCRIMSHAW, *supra*, at 149, 152.

² An inherent problem with placing the full responsibility of apprenticeship on the private sector is the long period of training required. Both varying levels of interest in cooperative endeavors within industry and fluctuations in market cycles make it hard to ensure completion of an extended training experience. See SCRIMSHAW, *supra*, at 43 (the "opportunistic" employer responds to spot shortages) and WILLIAM F. PATTERSON AND M.H. HEDGES, EDUCATING FOR INDUSTRY: POLICIES AND PROCEDURES OF A NATIONAL APPRENTICESHIP SYSTEM 111 (1946) (industry-only schools are "lavish" in good times, but vulnerable when business goes down).

create minimum wage laws through the private industry codes of the National Recovery Act ("N.R.A."). *To Safeguard the Welfare of Apprentices: Hearings on H.R. 6205 Before a Subcomm. of the Comm. on Labor, House of Representatives, 75th Cong., 1st Sess. 3* (1937) (testimony of Beyer) [hereinafter "*Safeguard*"]. These codes established a minimum wage, but the codes failed to establish an exemption from the minimum wage laws for apprentices. *Id.* The Federal Committee on Apprenticeship ("Committee") was established in June 1934, in part, to create a definition of an apprentice in order to prevent employees from being used merely as a source of "cheap labor." *Id.* at 47 (Report of the Federal Committee on Apprentice Training). The Committee's definition of a "bona fide" apprentice included the requirement that agreements between an employer and an apprentice be approved by the state committee on apprenticeship. *Id.* State apprenticeship committees established under the N.R.A. would be responsible for applying the federal Committee's rules and regulations. *Id.*

In 1938, Congress enacted the Fair Labor Standards Act ("FLSA"), ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. §§ 201-218 (1994)), requiring the payment of a minimum wage to most workers. In that same year, the Department of Labor, under the authority of section 14 of the FLSA, promulgated regulations that specified the conditions under which an apprentice could be exempted from the minimum wage requirements of the FLSA. 29 C.F.R. §§ 521.1-521.90 (1938). These regulations defined an apprentice as a worker registered under approved substantive standards:

[A] person at least 16 years of age who is covered by a written agreement with an employer, or with an association of employers, which apprenticeship agreement (1) has been *approved by the State Apprenticeship Council* or other established authority of the State, or if none such exists, by the Federal Committee on Apprenticeships, and (2) provides for not less than 4,000 hours of reasonably continuous employment for such person, for his participation in an *approved schedule of work experience through employment and at least 144 hours per year of related supplemental instruction.*

29 C.F.R. § 521.1 (1938)³ (emphasis added).

This evolution occurred during the same period that a second legal development relevant to this case, enactment of prevailing wage laws, was taking hold.

³ This definition of "apprentice" is virtually identical to the definition of apprentice published in 1937 by the Federal Committee on Apprenticeship, with the endorsement of the Department of Labor, prescribing "Suggested Language for a State Apprenticeship Law." *ABBOTT, supra*, at 251, reprinting the text of the suggested law.

The current regulations define an apprentice consistent with this original definition by providing that he or she be employed "under standards of apprenticeship fulfilling the requirements of § 29.5." 29 C.F.R. § 29.2(e) (1995), *Pet. App.* 65.

The reference to "standards of apprenticeship" defines the organized written plan embodying the terms and conditions of employment, training, and supervision (detailed in 22 subparts), which include the familiar elements of a written agreement as required by state law incorporating standards, § 29.5(b)(11) (1995), and the registration of agreements, § 29.5(b)(18) (1995). *Pet. App.* 72-75.

II. Prevailing Wage Laws Accommodate Contractors' Use of Apprentices By Defining An Apprentice Before A Public Work Begins And Offering An Apprentice Wage Below Craft Journey Rates.

The broad establishment of prevailing wage and other minimum wage laws occurred contemporaneously with the change in the governmental role in promoting apprenticeship. With the enactment of statutory minimum wage provisions came the recognition that unless wage laws were structured to recognize the particular wage practices common in apprenticeship agreements, employers could be discouraged for economic reasons from providing the on-the-job training opportunities essential to apprenticeship. (*See, supra*, pp. 5-6.)

The so-called prevailing wage laws are analogous to minimum wage laws in many respects, but are applicable to governmental projects and endeavor to replicate private wage rates on public projects. Underlying prevailing wage laws is the general principle that public construction contracts be awarded to the lowest bidder. 1 WITKIN, SUMMARY OF CALIFORNIA LAW § 79 (9th ed. 1987 and Supp. 1995). By requiring employers entering into such contracts to observe, as a minimum, the wages prevailing in the locality of the construction for each particular kind of worker, the prevailing wage laws prevent contractors from lowering labor standards and engaging in unfair wage competition in order to submit the lowest bid. At the same time, the quality of work on governmental projects is preserved by assuring that contractors do not hire substandard workers who cannot command the prevailing wage and are willing to work for less. *Lusardi Const. Co. v. Aubry*, 1 Cal. 4th 976, 4 Cal. Rptr. 2d 837 (1992).

The federal Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1994), for example, passed in 1931, sets the minimum wages that must be paid on federal public works projects as the wages paid for similar workers on private construction jobs. In 1931, California passed a similar law, modeled on the Davis-Bacon Act, *O.G. Sansone Co. v. Dept. of Transportation*, 55 Cal. App. 3d 434, 458 n.4 and accompanying text, 127 Cal. Rptr. 799 (1976), which established on a trade-by-trade basis the wages that must be paid to workers on public works projects funded by the state.

Both the Davis-Bacon Act and the California prevailing wage law allow a wage for registered apprentices in apprenticeship programs approved as meeting the standards of the National Apprenticeship ("Fitzgerald") Act, 29 U.S.C. § 50 (1994), different from that applicable to fully-qualified journey-level workers. See 29 C.F.R. § 29.2(f) (1995) (federal definition of apprenticeship program), Pet. App. 65; CAL. CODE REGS. tit. 8, § 205(e) (1995) (California counterpart). Under both the Davis-Bacon Act and the California law, the specific prevailing wage for apprentices is set at less than that for fully trained workers in the trade, and varies with the apprentices' level of progress through the multi-year apprenticeship program. See 29 C.F.R. § 29.5(b)(5) (1995), Pet. App. 73; CAL. CODE REGS. tit. 8, §§ 208(b), 212(c)(7) (1995); CAL. LAB. CODE § 1777.5 (West Supp. 1996), Pet. App. 58-63.

Like the minimum wage laws, neither federal nor state prevailing wage laws leave the issue of determining which workers may be paid at the apprentice wage rate to a case-by-case, or post hoc, decision. Under the Davis-Bacon Act, only workers in a bona fide apprenticeship program registered with the "State Apprenticeship

Agency" or the federal Bureau of Apprenticeship and Training ("BAT") are deemed "apprentices." 29 C.F.R. § 5.2(n)(1) (1995). Under regulations covering required Davis-Bacon contract clauses, "[a]pprentices will be permitted to work at less than the predetermined rate when they are employed pursuant to and individually registered in a bona fide apprenticeship program . . ." under the registration requirement defined above. 29 C.F.R. § 5.5(a)(4) (1995).

California's prevailing wage law apprentice wage provisions are similar. CAL. LAB. CODE § 1777.5 (West Supp. 1996). "Apprentices" are defined by characteristics particular to the worker ("training under apprenticeship standards and written apprentice agreements") and, secondarily, by state approval of the training and skill development that is provided the apprentice. Specifically, apprentices are to be "registered," and the standards and agreements covering them while registered are to provide for a commitment to a minimum term of employment, education, and "participation in an approved program of training." CAL. LAB. CODE § 3077 (West 1989). The California Apprenticeship Council ("CAC") is authorized to approve apprenticeship standards, CAL. LAB. CODE § 3071 (West 1989), a term synonymous with "approved program of training." CAL. LAB. CODE § 3077 (West 1989). The CAC is the "State Apprenticeship Agency" recognized by the federal BAT as the body with authority to approve apprenticeship programs in California pursuant to federal standards and for federal purposes, including the Davis-Bacon Act. 29 C.F.R. § 29.12 (1995), Pet. App. 84-89.

These special provisions of the prevailing wage law define an apprentice for prevailing wage purposes. This

definition serves both legal doctrinal imperatives and practical concerns.

The first state laws requiring contractors on public works to pay wages equivalent to those prevalent in the private market were declared unconstitutional because contractors could not determine with any precision their wage obligations in advance of bidding. *Connally v. Gen. Construction Co.*, 269 U.S. 385, 393-394 (1926). The Davis-Bacon Act, and California's law modeled on that Act, were designed to avoid these constitutional problems by determining minimum wage rates with specificity before the contractor is obliged to observe them, tying those rates to "corresponding classes of laborers and mechanics," Davis-Bacon Act, 40 U.S.C. § 276a (1994), or "craft, classification or type of workman." CAL. LAB. CODE § 1773 (West 1989).⁴

Setting wage rates for apprentices as a "type of workman" presents special difficulties. Apprentices fall between skilled and unskilled workers, and "[p]art of apprentices' remuneration is the coaching and varied experiences received." WILLIAM F. PATTERSON AND M.H. HEDGES, *EDUCATING FOR INDUSTRY: POLICIES AND PROCEDURES OF A NATIONAL APPRENTICESHIP SYSTEM* 81 (1946). Additionally, "predetermination" of the apprenticeship wage for the duration of the public project is difficult because a central part of apprenticeship is prompt escalation in wages as skill levels progress. *Id.* at 81. At the same time, without some effort to define with precision the "type of

⁴ See, e.g., *Metropolitan Water District v. Whitsett*, 215 Cal. 400, 10 P.2d 751 (1932).

workman" who can be paid as an apprentice and to designate the wages such a worker is to be paid, the prevailing wage law as a whole, dependent as it is upon tying wage rates to particular classes of workers, becomes a nullity: Any "apprentice" classification could then be used as a residual class for workers to whom the employer chooses to pay less than the determined prevailing wage for his or her craft. Cf. *Bldg. and Const. Trades' Dept., AFL-CIO v. Donovan*, 712 F.2d 611, 626-629, (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984) (discussing difficulties with Davis-Bacon "helper" classification if undefined).

In response to these legal and practical realities, the California prevailing wage laws, like the early federal minimum wage and prevailing wage provisions (see, *supra*, pp. 5-6, 8-9), provided a definition of "apprentice" applicable across crafts and trades, and provided that "apprentice" wages could be determined incrementally, according to preset methods, as each apprentice progressed through his or her craft program.

The initial version of the prevailing wage provision at issue here, 1937 Cal. Stat. 872 at 2424, provided simply that "every such apprentice shall be indentured to the contractor doing the work and shall be steadily employed by him, shall be paid the standard wage paid to apprentices under the regulations of the trade" Two years later, however, the California provision governing the wages paid apprentices on public works projects was revised. 1939 Cal. Stat. 971.

What had intervened to cause the legislature to amend California's apprenticeship law was the passage

of the 1937 Fitzgerald Act, followed by passage of California's first comprehensive apprenticeship law, known as the Shelley-Maloney Apprentice Labor Standards Act of 1939. 1939 Cal. Stat. 220 (current version at CAL. LAB. CODE §§ 3070 *et seq.* (West 1989 and Supp. 1996)). The changes to the prevailing wage apprenticeship provision substituted "written agreement" for "indenture," and specified that the agreements should be under the comprehensive statute for program standard approval and apprentice registration, the Shelley-Maloney Act ("Chapter 4 . . . of Division 3" of the Labor Code) as cross-referenced in the present statute.⁵ Pet. App. 58.

⁵ CAL. LAB. CODE § 1777.5 (West Supp. 1996) is not enforced precisely as it appears in the California statutes because of partial invalidation in respects not here pertinent, and because the CAC has exercised its express authority under CAL. LAB. CODE § 1777.7(e) (West 1996) to promulgate interpretive rules in order to determine the appropriate application of the provision in light of that invalidation. None of these court or administrative actions, however, change the definition of an apprentice which is at the heart of this case.

In particular, the statute and the regulations define apprentice in a way that does not distinguish between apprentices registered in different types of apprenticeship programs – unilateral, employer-only or joint, union-management programs; multi-employer or single employer programs; or programs financed through employers' general funds rather than funded in some respect through a separate trust fund. Any of these kinds of programs can be registered, and apprentices registered through any of them may work on public works. CAL. CODE REGS. tit. 8, §§ 230.1(a), 228(c) (1995). Nor does the definition of apprenticeship for purposes of applying the prevailing wage laws establish any employer

The convergent development of state and federal apprenticeship and prevailing wage statutes described above is currently reflected in the laws not only of the federal government and California, but of a majority of the other states as well. Thirty-two states have prevailing wage laws, with at least twenty-eight states restricting their sub-journey apprentice wage to apprentices in programs registered with or approved by the state or BAT. Cert. Pet. 8 n.2. Twenty-six states share federal State Apprenticeship Council ("SAC") status with California, Cert. Pet. 9 n.3, and in those states the administrative approval of apprenticeship programs is done by the states, albeit pursuant to federal standards.

III. Workers Who Were Not Registered Apprentices Were Paid Wages Below The Journey Level, In This Case.

The facts giving rise to the current dispute are as follows: In the Spring of 1987, the County of Sonoma

funding of apprenticeship as a condition of employing registered apprentices or paying them the apprentice wage.

Moreover, as interpreted by the CAC, CAL. LAB. CODE § 1777.5 does not prohibit unregistered "apprentices" from working on public works. Rather, the statute simply requires that any non-registered apprentice be paid at the appropriate journey-level rate for the class of work performed. CAL. CODE REGS. tit. 8, § 230.1(b) (1995). As written, CAL. LAB. CODE § 1777.5 requires that contractors, or their sub-contractors, become signatory to the standards of a joint apprenticeship committee and make contributions to the trust fund supporting the apprenticeship training of the committee. Neither of these requirements currently is in effect, nor were they at issue when this case was decided. CAL. CODE REGS. tit. 8, § 230.1 (1995).

awarded respondent Dillingham, as general contractor, a state-funded public works contract for building a detention facility. Pet. App. 25. On a public works project, payment of prevailing wages by all subcontractors is an element of the construction contract with the general contractor. CAL. LAB. CODE § 1771 (West 1989). Mr. Manuel Arceo, doing business as Sound Systems Media, was selected as a subcontractor on the job. R. 27, Decl. Arceo, ¶ 3.

In June 1988, after the contract was let, but before Arceo's on-site work began, Arceo entered into a multi-employer collective bargaining relationship with the National Electronic Systems Technicians Union. Pet. App. 26. Although the multi-employer bargaining unit did agree to apprenticeship standards on June 20, 1988 (R. 39, Decl. Lee, Exh. D, p. 032), no attempt was made to register the apprenticeship program until February, 1989. *Id.* at 25, 34 (date stamps). Moreover, before February, 1989, the new program would not have met the applicable standards had it applied for registration, because no arrangements had been made to provide any classroom training to the apprentices. R. 39, Decl. Lee, Exh. D, p. 028 at Article XI.⁶ Only in February, 1989, did the new

⁶ The federal standards, 29 C.F.R. § 29.5(b)(4) (1995), Pet. App. 72-73, as enforced by the state, CAL. LAB. CODE § 3074 (West 1989), CAL. CODE REGS. tit. 8, § 212(a)(3) (1995), require that apprenticeship programs provide "related and supplemental instruction" to apprentices. Upon approval of the standards, the program's registered apprentices meet the prerequisites to share in the approximately \$7 million allocated by California to the community colleges to underwrite "related and supplemental instruction." CAL. LAB. CODE § 3074.3 (West 1989) (prerequisite);

apprenticeship program at last secure the necessary letter of commitment for educational services from a community college. R. 39, Decl. Lee, Exh. D, p. 039.

The apprenticeship program finally filed its completed application for certification in February 1989, and was initially approved by the Chief of the Division of Apprenticeship Standards, after some necessary changes, in August. R. 39, Decl. Lee, Exh. D, pp. 032, 037, 038. Final approval by the CAC itself, the ultimate decision making authority where approval is contested, was delayed because of an appeal filed by another apprenticeship committee and was not effective until October, 1990.

Throughout the period of on-site work – both before and after the application for approval was first filed – Arceo employed construction workers and filed certified payrolls showing the pay rates for each craft, classification, or type of worker, and the actual amounts paid to each individual. R. 39, Decl. Lee, ¶ 2, Exh. E. Throughout that period, Arceo used the apprentice rate for certain workers even though those workers were not registered apprentices participating in an approved program.

IV. Proceedings Below.

When an audit showed that Arceo had paid workers at an apprenticeship rate who were entitled to be paid at the journey level, Dillingham received notice from the

CAL. EDUC. CODE §§ 8150-8156 (West 1994 and Supp. 1996) (apprenticeship reimbursements); Budget Act, 1995 Cal. Stat. 303, items 6870-101-001(a)-(b) (appropriation of \$6.99 million for FY 1995-1996).

state requiring that it withhold funds from subcontractor Arceo in order to pay Arceo's workers the difference between the wages they were paid and the amount they should have been paid. On receiving this notice, Dillingham and Arceo sued in federal district court for declaratory relief, alleging that California's requirement that workers on a prevailing wage project be paid at full journey level unless they are registered apprentices as defined by the state is invalid as preempted by both ERISA and the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* (1994). Specifically pertinent here, Dillingham and Arceo claimed that the existence of Arceo's collectively bargained pay rate for apprentices, without more, established that workers paid that rate were "apprentices" in an ERISA-covered "plan, fund or program," and any state law setting wages for those individuals impermissibly "relates to" that purported ERISA plan within the meaning of section 514(a) of ERISA, 29 U.S.C. § 1144(a) (1994).

The district court rejected preemption arguments under ERISA and the NLRA,⁷ Pet. App. 39-40, 48-49. It held that California's regulation of apprenticeship programs is part of a cooperative state-federal effort for the formulation and promotion of apprenticeship programs, and is therefore saved from preemption by the Fitzgerald

⁷ The district court ruled that because state enforcement of minimum apprenticeship standards constituted a valid "minimum employment standard" they were not preempted by the NLRA under *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) and *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987). The Ninth Circuit did not reach this issue and no cross-petition for certiorari was filed raising it.

Act, as incorporated in ERISA's savings clause, section 514(d), 29 U.S.C. § 1144(d) (1994).

The Ninth Circuit reversed, holding that the restriction of the apprentice prevailing wage to workers who were registered apprentices was preempted by ERISA on the following grounds:

1) California's application of its prevailing wage law to allow payment of the lower apprentice rate only to employees in "approved" programs had the effect and possibly the aim of encouraging participation in state approved ERISA plans while discouraging participation in unapproved ERISA plans. Pet. App. 14.

2) California law was not saved from preemption by the ERISA savings clause because, while the Fitzgerald Act does provide for state approval of apprenticeship programs, it does not depend on state law for enforcement, does not mandate apprenticeship programs and does not seek to discourage other types of training programs. In the view of the Ninth Circuit the Fitzgerald Act would not be impaired by preemption of this California law. Pet. App. 18.

In their unsuccessful petition for rehearing, petitioners noted that the Ninth Circuit opinion did not discuss at all this Court's then-recent decision substantially recasting the previous understanding concerning which state laws "relate to" ERISA plans. *New York State Conference of Blue Cross and Blue Shield et al. v. Travelers*, 115 S. Ct. 1671 (1995).

SUMMARY OF ARGUMENT

This case concerns California's apprentice wage on publicly funded construction projects. This wage is limited to registered apprentices in apprenticeship training programs which have been approved as meeting federal standards. The question in this case is whether ERISA preempts such a rule and requires the state to use a different definition of apprentice on its public works from that used by the federal government for federally funded works in California. California contends that creating such conflicting rules for contractors within the state is not required by ERISA preemption.

ERISA preemption embodies Congress' intent to spare employee benefit plans from conflicting state and local regulation. The difficulty comes from the unhelpful choice of terms used in the preemption clause. ERISA's preemption clause uses "relates to" as a term of limitation indicating that Congress only intended to preempt state laws that relate to ERISA plans. This text turns out to be unhelpful, as this Court pointed out in *Travelers* last term, because all laws stand in some relation to one another. Proper analysis of the statute and Congressional intent therefore requires more than the construction of a simplistic syllogism demonstrating that one law relates to another.

The California law in question is one at the intersection of three areas of traditional state concern: State public works and public contracting, state regulation of wages, and state approval of apprenticeship programs and promotion of apprenticeship. Preemption in areas of

traditional state regulation will come only after a showing of a clear and manifest intent of Congress. In this case there is no indication that Congress intended to require California to adopt a different rule for apprentice wages on state public works from that on federal works.

California law does not tell any ERISA plan what to do. Rather it tells contractors which workers may be classified as apprentices for pay purposes on public works. The definition California has chosen is the same as that used by the federal government. This choice has only an indirect economic effect on some ERISA plans. It provides an incentive to plans to meet the federal standards needed to obtain state approval of an apprenticeship program. The law does not command any particular benefit structure or form of administration. The problem is that whatever choice a state makes concerning a prevailing wage law, or an apprentice definition in such a law, the choice will in some sense "relate to" an ERISA plan. A state law will either promote apprenticeship or hinder it.

If the Court finds that the law in question does "relate to" ERISA plans, then California contends that the law is saved from preemption. The Fitzgerald Act expresses a congressional goal to promote apprenticeship and apprentice labor standards. This Act would be impaired by the preemption of California law, which recognizes only apprentices in programs meeting the Fitzgerald Act standards.

ARGUMENT

Under California's prevailing wage law, the state determines the minimum wages to be paid on public works jobs for each category of worker (carpenters, electricians, operating engineers, laborers, and so on), setting those wages at the level prevailing in the locality for that particular kind of work. Enforcing that scheme necessarily entails a governmental determination that the contractor is correctly classifying the worker in question. If contractors were free to define highly-skilled individuals who operate cranes as laborers, for example, and pay them laborers' wages, the overall scheme of the prevailing wage statutes would be fatally impaired. Poor quality and even dangerous construction work is the likely immediate result, since fully-qualified skilled workers are unlikely to take jobs at wages far below that prevailing for their craft.

Likewise, a state cannot meaningfully provide that apprentices are to be paid one wage and journey-level workers another absent some means of distinguishing apprentices from journey-level workers. It is for that reason that both federal and California prevailing wage laws have, since long before ERISA was enacted, defined the individuals who may be treated as apprentices for purposes of the prevailing wage law, rather than leaving the category for employer definition. (See, *supra*, pp. 8-9.)

I. ERISA Does Not Preempt California's Ability To Restrict Apprentice Wages To Registered Apprentices Because, Under *Travelers*, California's Law Does Not Relate To ERISA Plans.

The question in this case is whether Congress, in enacting ERISA, intended to displace the state's authority to set wages on its own public works jobs for *one* category of workers paid "their regular compensation directly by the employer" for productive work, like any other employee, *Massachusetts v. Morash*, 490 U.S. 107, 117 (1989), quoting Secretary of Labor, Notice of Proposed Rulemaking, 39 Fed. Reg. 422 (1974), by withdrawing the authority to determine which workers meet the criteria that justify paying them as apprentices and which do not.

A. *Travelers* Provides The Analytical Framework For Approaching The "Unhelpful Text" Of ERISA.

Last term *New York State Conference of Blue Cross and Blue Shield et al. v. Travelers*, 115 S. Ct. 1671 (1995), addressed a problem of statutory construction caused by the "unhelpful" text of ERISA, which preempts all laws which "relate to" employee welfare benefit plans. *Id.* at 1677. In cases where, as here, federal law is said to bar state action in fields of traditional state regulation, this Court has worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Travelers*, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

ERISA cannot be taken to mean that literally all laws which "relate" to ERISA plans are preempted, because as *Travelers* noted, in reality all things are in some fashion related to one another. 115 S. Ct. at 1677. In light of this unhelpful text, we must look to the "objectives of the ERISA statute as a guide to the scope of the state law Congress understood would survive," *id.*, as well as the purpose and effect of the state law in question. *Id.* at 1678.

Travelers first distinguishes the preemption treatment of those laws which explicitly refer to ERISA covered plans, see, e.g., *Mackey v. Lanier Collection Agency & Services, Inc.*, 486 U.S. 825 (1988), from those which do not. As we will show, this California law does not make reference to an ERISA plan.

Where the state law has only an indirect effect on an ERISA plan, *Travelers* directs us to determine Congress' intent concerning preemption. *Travelers* indicates that any state law whose only impact upon employee benefit plans results from the likely impact on plans of economic inducements or disincentives is to be preempted only in narrow circumstances – namely, where the "state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage," that law "might indeed be preempted." 115 S. Ct. at 1683 (emphasis supplied). Where, in contrast, the state law does not implicate the basic intent of the preemption provision – "to avoid a multiplicity of regulation in order to permit the nationally uniform administration of

employee benefit plans" – no preemption should be found. 115 S. Ct. at 1677-78.

B. California's Law Involves Areas Of Traditional State Regulation And Warrants The Strongest Presumption Against Preemption.

The California Labor Code provision here at issue comes to this Court with the strongest possible presumption against ERISA preemption because it lies at the intersection of three different "areas traditionally subject to local regulation," *Travelers*, 115 S. Ct. at 1683, and should therefore be declared preempted only upon the clearest showing that Congress intended this result.

One area is apprenticeship, which the history (discussed *supra* at pp. 2-6), shows has been a traditional state concern from colonial times. The second area is private sector wage regulation, that *Morash* recognized as a traditional area of state concern which ERISA was not intended to reach. Wage regulation standing alone is entitled to the "starting presumption that Congress did not intend to supplant state law." *Travelers*, 115 S. Ct. at 1676. The third area is state authority to generally regulate the wages and hours of those who work on state funded construction projects. See *W.W. Atkin v. State of Kansas*, 191 U.S. 207 (1903). The tradition of state regulation in this area is long, and modern state prevailing wages laws fall in this line of authority. (See, *supra*, at pp. 6-13.)

No claim is made here that ERISA preempts any one of these areas. Rather, it is their intersection in a rule that

defines an apprentice on a state public work as one registered in an approved program that is challenged. Apprenticeship laws have existed since the Elizabethan era, and have been a fixture in America since colonial times. States' general concerns with apprenticeship labor standards grew, first in administrative practice, then in legislation and regulation, into a state rule defining apprentices as those registered under federal standards. In the course of that growth, federal law specifically recognized and endorsed a strong state role.

By the 1920's, industry's needs and the progressive era's interest in popular education, child labor, and the creation of enforceable labor standards came together in the first comprehensive state laws to produce state "registration" and "apprenticeship standards" as formal aspects of "apprenticeship." The first comprehensive state law was enacted in Wisconsin in 1911 (amended 1923), followed by Oregon in 1931.⁸ Both these statutes expanded the common law based "indenture" of an apprentice to a master into the modern "written agreement," to clarify and expand what must be taught to apprentices. Both states specified what would be in an apprentice's "written agreement," together with requirements that such agreements incorporate trade group or multi-employer "schedules" of processes to be worked. These were the predecessors of what are now "apprenticeship standards." Each state defined "apprenticeship" under these new laws as a distinct method of training to

⁸ The statutes are reproduced in SCRIMSHAW at 237 App. A (Wisconsin) and 244, App. B (Oregon).

learn a trade.⁹ Each law had requirements that foreshadowed the modern "registration" of apprentice agreements.¹⁰ In short, these early laws expanded the role of the state from one focusing largely upon passive resolution of disputes to one involving active oversight of the quality of private supervision and training of apprentices.

In the early 1930's the federal government adopted and promoted the states' traditional apprentice registration requirements for apprentice standards, which set out minimum requirements for education and training, culminating in federal standards.¹¹ Executive Order 6750-C, Jan. 23, 1934, set up a Federal Committee which brought together industry groups, labor and local government for the first time on a national level. *See generally Safeguard* at 72.

⁹ Just as participation was marked by state approval, so too the certification of completion came from the state. SCRIMSHAW at 209-211 (Wisconsin) and Appendix B (Oregon).

¹⁰ Oregon provided that one was not participating in "apprenticeship" unless there was a written agreement, which had to be for a six month term. SCRIMSHAW at 247. (Oregon, INDENTURE STIPULATIONS, II Definitions, (1) the Apprentice). In Wisconsin there was a requirement that the term "apprenticeship" could not be used without a written agreement subject to the state law. SCRIMSHAW at 211, Wisconsin, Rule 10.

¹¹ The economic dislocation of the Depression inspired an unprecedented intrusion of the federal government into economic affairs by the mandatory industry "codes" of the National Recovery Act. Apprenticeship proved the exception to the federalization of economic relations with the states retaining a significant role. Apprenticeship's traditional voluntary character let the Committee's involvement in apprenticeship survive the demise of the N.R.A.

The Committee recommended and promoted basic national standards for apprenticeship in 1935. PATTERSON at 59, 64. In doing so the Committee outlined a five point program of apprenticeship regulation to be conducted in the states by state committees, including provisions on apprentice wages, length of term, continuous employment, on-the-job training and classroom education. *Safeguard* at 47 (report of the Committee), 23-25 (testimony of Rosenthal); PATTERSON at 40. In 1937, the Secretary of Labor published "Suggested Language for a Voluntary Apprenticeship Bill" drafted by the Committee that incorporated the five points of the 1934 proposal. ABBOTT, *supra*, at 247. The purpose of that suggested bill was to establish "conditions of apprenticeship which provide a fine standard of training, practically similar in all states." *Safeguard* at 23-25 (testimony of Rosenthal). The definition of an apprentice (*quoted supra*, n.3), both used by the federal government and promoted to the states, restricted the definition to someone covered by a written agreement registered with a State Apprenticeship Council (where no such Council exists, registration is with the Federal Committee on Apprenticeship). *Safeguard* at 73-74; PATTERSON at 78; DANAHER, APPRENTICESHIP PRACTICE IN THE UNITED STATES 7 (Graduate School of Business, Stanford University, Business Research Series No. 3, 1945) (Role of the Comm. on App.). Thus, portions of the Wisconsin and Oregon model definitions of apprenticeship became federal standards, and then spread to other states by way of the Federal Committee.

In 1937, in the Fitzgerald Act, Congress stated its intentions to promote state activity in the area of raising

apprentice labor standards. Congress used the terms "labor standards necessary to safeguard the welfare of apprentices," as well as "standards of apprenticeship" to describe what states were both to "formulate" and "promote." Those labor standards were to be included in "contracts of apprenticeship." The sponsor of the bill proposed that the Federal goal would be to protect labor standards generally, Pet. App. at 114, 117-119, and specifically to promote cooperation with the states.

MR. FITZGERALD. The bill sets up standards by Federal cooperation with the States and through the formation of voluntary committees in the States, throwing a cloak of protection around the boys and girls and setting up standards and protecting them and guaranteeing that when their time of service in a trade has expired, they will come out full-fledged mechanics. It also incorporates vocational education in the plants. Pet. App. at 114.

The hearings on the bill produced testimony that apprenticeship was distinct from other training because apprenticeship was under a written agreement and standards. Witnesses commended the Federal Committee's standards which were to apply to all endeavors defined as apprenticeship and distinguished between apprentices on the one hand, and helpers and short term learners on the other. One such distinction was that every apprentice should have 144 hours of classroom instruction; another that every apprentice should work under a written agreement or an indenture; and, finally, that every agreement should be approved by a third party who would act as

the arbiter of disputes. *Safeguard* at 72-75 (testimony of Patterson).¹²

The Department of Labor, charged with putting the Fitzgerald Act in effect, effectuated Congress' intent by setting up a partnership with the states around a common definition of "apprentice," based on approval of the apprentices' programs as meeting federal standards. By January 1, 1946, 16 states and Hawaii had enacted apprenticeship laws, and 9 states set up apprenticeship councils recognized by the federal government. PATTERSON at 43. Another 10 states had state apprenticeship councils without laws. PATTERSON at 68. The federal apprenticeship effort saw itself as a placeholder until states assumed their responsibilities to approve standards and register agreements. Once a state council was recognized, its authority to define "apprentice" was not only for state laws, but was also for federal wage laws.¹³ In the eyes of the Department of Labor, seeking recognition under the

¹² Patterson was likely to know Congress' intent to distinguish between other training and apprenticeship because he had been involved with the Federal Committee established by the Executive Order; had testified for the passage of the Act; and acted for the Secretary of Labor in the initial interpretation of the Act in the decade thereafter.

¹³ See, *supra*, n.3 and accompanying text. There was never a proposal to federalize the handling of apprentice complaints against contractors, or committees, despite the well recognized fact that, in any work or educational situation involving youth, disputes will arise. Misunderstandings were frequent in the old days of guild-apprentice agreements, as noted in RORABAUGH, and were dramatized on the stage. See GILBERT AND SULLIVAN, *PIRATES OF PENZANCE* (1880).

Fitzgerald Act was the first thing a state apprenticeship council should do.¹⁴

In sum, all three of the state concerns which intersect in California defining an apprentice as one registered under federal standards – protecting workers' wages, setting rules governing public contracting, and promoting effective apprenticeship programs – were areas of extensive and traditional state regulation long before ERISA was enacted. So too was the states' practice at issue here, the use of the federal definition of registered apprentice, and this use is entitled to a presumption against preemption.

C. California's Law Does Not Reference ERISA Plans.

The apprenticeship wage provision of section 1777.5 does not make the kind of clear and direct "reference to" employee benefit plans that has been fatal, without more, in a narrow group of cases. *Mackey, District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).¹⁵

¹⁴ "Such designation means much because it indicates that the plan and standards of the council are in accord with the national scheme of apprenticeship. After the council has been officially recognized . . . it is in a position to act on all matters such as exemption from federal wage minimums, approving industrial establishments for apprenticeship, and carrying out the agreements made on a country-wide basis with management or labor organizations." PATTERSON at 69, 72.

¹⁵ While the Court held generally that a direct reference to ERISA plans, without more, can trigger ERISA preemption, it is noteworthy that in none of the cases did the Court's analysis

California's Labor Code section 1777.5 does not make reference to any employee benefit plan. It provides that contractors, not apprenticeship programs, may pay a lower wage to registered apprentices on public works. The law does not require any employee benefit plan to do anything, or to have any particular structure or form of administration.¹⁶ The law is not predicated on the existence of an employee benefit plan.

California defines a "registered apprentice" as one working under "apprenticeship standards" and "written apprentice agreements." CAL. LAB. CODE Section 1777.5. Pet. App. 58-63. By cross reference to the definition of apprentice in Labor Code section 3077, those standards and written agreements are to be part of "an approved program" of training and education.¹⁷ However, such an apprenticeship

end with the observation that there was such a reference. Rather, the Court in each instance looked for, and found, other significant indications either that Congress must have intended preemption because of other provisions in ERISA addressing the same issues as the state law (*Mackey and Ingersoll Rand*), or that the state law in question had a direct and significant burden upon ERISA plans (*Washington Board of Trade*).

¹⁶ This is in contrast to state rules determining when a sponsor may create a plan, or submit an existing plan for approval. Such rules, aimed directly at plans, raise very different ERISA concerns. See, e.g., *Associated General Contractors v. Smith*, 74 F.3d 926 (9th Cir. 1996). All parties concede such direct regulation is not at issue here. There was no challenge below to the approval process or the standards applied. Such an issue of state law directly referring to a plan is not present here because, in the proceedings below, the new apprenticeship program's sponsor did not challenge the state approval process.

¹⁷ Under *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), cert. denied, 505 U.S. 1204 (1992) and

"program" is not the same thing as an ERISA-covered apprenticeship plan. Some employers provide unilateral apprenticeship training under approved standards without ever creating an ERISA covered benefit plan. In Wisconsin, with a long-established apprenticeship tradition, immediately before ERISA apprenticeship committees "seldom" had financial support.¹⁸ Department of Labor regulations make clear that "neither on-the-job training nor classroom training paid for out of an employer's general assets is an ERISA plan." 29 C.F.R. § 2510.3-1(b)(3)(iv) (1995); 29 C.F.R. § 2510.3-1(b) (1995); 29 C.F.R. § 2510.3-1(k) (1995); 40 Fed. Reg. 24,643 (1995); ERISA Advisory Opinions Nos. 76-01 and 83-32A.

The program standards which must be approved describe the selection and training requirements and working conditions for apprentices. They include provision for related instruction, on-the-job supervision, review of the apprentice's progress, progressively increasing wages, an outline of the work processes in which the apprentice is to be trained and a procedure for the resolution of disputes. See similar definitions in CAL. CODE REGS. tit. 8 § 205(f) (California definition) and 29 C.F.R. § 29.5 (federal definition). These program standards apply regardless of whether the program is ultimately provided by an ERISA plan, and therefore the statute cannot be said to make reference to ERISA plans.

Southern California ABC v. California Apprenticeship Council, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992), the state may not impose additional criteria for approval. California does not dispute that it may not impose such requirements for approval beyond the categories set out in the Fitzgerald Act regulations defining apprenticeship standards.

¹⁸ CENTER FOR STUDIES IN VOCATIONAL AND TECHNICAL EDUCATION, RESEARCH IN APPRENTICESHIP TRAINING 86 (1967) ("78 percent of them have no source of financing").

D. This Law Has A Permissible Purpose And Effect Which Congress Did Not Intend To Pre-empt.

Since the Labor Code's use of the term "registered apprentice" is not a direct reference to an ERISA plan, under *Travelers* we must undertake a fuller analysis of the purpose and effect of the law. On examination we find that the term "registered" apprentice is needed to define those less skilled workers who may be paid the lower apprentice wage on a public construction project. This law has a *direct* and purposeful connection to the payment of wages and the employment of workers on public works projects. Therefore, under *Travelers*, the question becomes adducing the intent of Congress. We must ask whether there are any specific indications "in the language of [ERISA] or the context of its passage [that] indicates that Congress chose to displace [*here state registered apprentice wage rates*], which historically has been a matter of local concern." (bracketed material added) 115 S. Ct. at 1680.

At the time of ERISA's passage, the partnership between the states and the federal government under the Fitzgerald Act had been in existence for 40 years. Both the longevity of this partnership and the federal policy behind it suggests that Congress would not have intended to overturn the states' ability to define an apprentice on a public works project by reference to registration, without any mention of such an intent in ERISA or its legislative history.

State registration of apprentices proved useful for advancing other congressional goals, in addition to its

original Fitzgerald Act goal of improving labor standards for apprentices. In such extensions, Congress assumed that the states would continue to exercise their authority to approve programs meeting federal standards, and the Department of Labor would continue to encourage the states to do so. Congress' earliest expansion of the use of registered apprentice as a benchmark for some level of quality in training was the contribution to the training effort during the Second World War, *PATTERSON* at 134-144, followed by efforts to include returning veterans to the skilled labor market, *id.*; currently 38 U.S.C. §§ 3108 (benefits), 3452(e) (apprenticeship to be one approved by BAT or states) (1994). Other statutes included apprenticeship, defined as conforming with federal standards by state or BAT recognition, as one of the ladders for the economically displaced, unskilled or dependent to leave poverty.¹⁹

In *Travelers* this Court observed, concerning states' efforts to control medical costs with federal encouragement, that Congress was unlikely to have undone such

¹⁹ The Carl D. Perkins Vocational Education Act and the Applied Technology Act Amendments of 1990. 20 U.S.C. §§ 2301, 2323 (state plan), 2471 (federal or state registration of apprenticeship programs) (1994); The School to Work Opportunities Act. 20 U.S.C. §§ 6101, 6103(13), (14) (federal or state registration of apprenticeship programs), 6123 (state plan), 6143 (state plan), 6145 (sub-grants to local partnerships) (1994); The Adult Education Act. 20 U.S.C. §§ 1211(b) (literacy programs for commercial drivers), 1211(c), (e) (approved apprenticeship training program, as defined by the National Apprenticeship Act) (1994); Vocational Training for Adult Indians. 25 C.F.R. § 27.8 (1995) (federal or state approval of apprenticeship program); Job Training Partnership Act. 29 U.S.C. § 1501, *et seq.* (1994).

efforts without significant mention in the legislative history of ERISA. 115 S. Ct. at 1681. The federal state partnership under the Fitzgerald Act is at least as extensive, and is based on older and more explicit Congressional intent. It seems very unlikely that Congress would have undone the partnership between business, labor and a majority of states in its own apprenticeship effort, then over 40 years old, without some extensive discussion and debate. Yet, practically the only discussion in the record is a sentence from Representative Dent addressing a minor point concerning reporting requirements for apprenticeship plans indicating an intent that the Secretary of Labor minimize ERISA's impact on reporting requirements for such plans: "We clearly expect the Secretary of Labor to continue his present policies with respect to such plans, and exempt them from the reporting requirements unless a clear reason for changing that policy is shown." 120 CONG.REC. 29197 (1974) (remarks of Rep. Dent). See also 120 CONG.REC. 29932 (remarks of Sen. Williams). If Representative Dent showed knowledge and concern about ERISA's impact on this relatively minor operational aspect of apprenticeship, then had the intent been to undo 40 years of practice, it is likely he or some other member would have made extensive comments.

The Secretary of Labor, charged with both Fitzgerald Act and ERISA responsibilities, issued regulations which assume that the states' traditional role of promoting apprenticeship and registering apprenticeship programs meeting federal standards was both to continue and was to be encouraged. The regulations were pending during consideration of, and were enacted just after passage of, ERISA. Given the role of the Secretary of Labor as

administrator of both the Fitzgerald Act and ERISA, promulgation of the 1973-1977 Fitzgerald Act regulations is a close and informed view of Congress' understanding of the propriety of states' continued use of the federal-state partnership's definition of apprentice. The regulations formalized the standards previously suggested to the states. They also regularized the recognition, which had existed since at least 1938,²⁰ of the state as the agency to define who was a registered apprentice for various federal labor standards which treated apprentices differently from those in less formal training.

These regulations were adopted in 1977 without any indication in the comments in the *Federal Register*, Pet. App. 94-106, that ERISA had just preempted the states' ability to use this common definition of an apprentice for state purposes. It seems extraordinarily unlikely that the Secretary of Labor, who enforces ERISA, would be promulgating regulations inviting more states to become approved to "register" apprentices if he understood that Congress had just preempted its use by ERISA.

E. Congress' Purpose For ERISA Suggests Positive Reasons Why States Should Retain the Ability to Recognize "Registered" Apprentices.

Finally, as in *Travelers*, the overall purpose of ERISA is a further source of guidance as to whether Congress

²⁰ In addition to the federal acts cited *supra* n.19, see regulations applicable to employment of apprentices pursuant to § 14 of the Fair Labor Standards Act, 29 C.F.R. §§ 521.1 - 521.11 (1995).

intended via the general, vague language of the preemption clause to preempt a state prevailing wage for registered apprentices. Cf. 115 S. Ct. at 1677. ERISA was intended, in part, to protect the interests of workers in actually receiving benefits from employee benefit plans. *Morash* at 1673. To require California law to recognize all training plans as though they meet the same standards as approved apprenticeship programs would hardly serve that purpose, and would make it more likely that some workers who thought they were apprentices would receive only the low apprentice wages, with little or none of the on-the-job training or related instruction which apprentices are to receive in federally defined apprenticeship.

ERISA was intended to allow for uniform plan structure and administration. Allowing states to use the federal definition of "registered apprentice" does not introduce the kind of lack of uniform treatment of plans which ERISA sought to prevent. The Fitzgerald Act regulations provide the states with criteria for evaluating an apprenticeship program, since meeting the federal requirements is also California's criteria for approval of a program. The only variation is the need to have work process standards which accurately reflect the local construction practices and building codes. For example, an apprentice in California will be learning earthquake specific construction technique, and school-based training in California will also depend on local conditions, like the accessibility of the school.²¹ Both are inevitable sources of

²¹ Indeed, while the Fitzgerald Act regulations provide for some reciprocity in program approval, that reciprocity does not

variation arising from local background differences, just as hospital rates in *Travelers* varied, independent of the state law in question.

F. The Indirect Effect That Section 1777.5 Has On ERISA-Covered Apprenticeship Programs Does Not Force Any Particular Plan Structure.

As we have shown, the California law does not directly make reference to ERISA plans, but serves purposes which are crucial if the state is to maintain an effective and fair prevailing wage system. The California statute does, however, have an indirect economic effect on apprenticeship programs. In *Travelers* we are told that if a "state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage," that law "might indeed be preempted." 115 S. Ct. at 1683 (emphasis supplied). That is not the case here. The indirect economic effect in this case arises only from the possibility that the existence of the lower apprentice wage will provide an incentive to some unregistered training programs to try to include the federal substantive provisions needed for approval. Such approval makes apprentices registered in the program more attractive workers on state and federal public works projects. A better program meeting higher labor standards may cost its sponsors more. A contractor who is considering an

extend to programs in the building and construction industry. 29. C.F.R. § 29.12(b)(8) (1995). Pet. App. 101-104.

apprenticeship program and who wishes to work on public works projects may wish to incur the increased cost of this higher level of training because of the ability to pay the apprentice wage on public works.

The fact that an apprentice wage break may provide an incentive to a subset of ERISA-covered programs to become approved by meeting federal standards has the kind of indirect economic effect on an ERISA plan which is not preempted under *Travelers*. This is so because, as discussed above, the state law limiting the apprentice wage to registered apprentices serves a legitimate purpose of maintaining the integrity of prevailing wage classifications and because it is the sort of preexisting area of regulation which survives absent a "clear and manifest" purpose by Congress to preempt. *Travelers* at 1676.

The California law in question presents an example of the kind of situation where the text of ERISA is unhelpful. The state must of necessity define "apprentice" in some way if the state is to regulate wages on state funded public works projects.²² Any prevailing wage law will "relate to" apprenticeship, either by accommodating apprenticeship by defining those who can be paid less, or by impeding the use of apprentices on public building projects by requiring all workers to be paid at journey level rates. Consequently a prevailing wage law whose

²² This is similar to the problem facing a state concerning value added tax laws. Such a law must define compensation in some way and some methods will mention ERISA covered benefits. See *Thiokol Corp., Morton International, Inc. v. Roberts*, 76 F.3d 751, 754-755, 759 (6th Cir. 1996).

primary purpose is to set journey level wages cannot be neutral as to its effect on the use of apprentices.

Absurd results can follow even when a state with a prevailing wage law accommodates an apprentice wage, as most do. The law must contain a definition of apprentice and there are limited alternatives. One alternative is to allow a contractor to unilaterally determine which workers will be paid the lower apprentice wage. Given that public works are nearly always required to be awarded to low bidders, this temptation would, in all likelihood, rapidly expand the number of persons paid as apprentices beyond the wildest dreams of those in Congress who passed the Fitzgerald Act to promote apprenticeship. Cf. *Building and Const. Trades v. Donovan*, 712 F.2d at 625 (prevailing wage laws can be subverted by arbitrary classifications). Contractors must be able to bid on public works without concern that a competitor will have an unfair advantage in the bid process by using wage rates premised on the availability of an unlimited number of phony apprentices.

A second possibility is for each of the 28 states with "apprentice wages" to make up its own definition of apprentice. That would hardly harmonize with Congress' goal in ERISA of eliminating conflicting state regulation since 28 states could come up with 28 unique definitions, some imposing criteria above the federal standard and others below. This approach would further complicate matters within the state because the Davis-Bacon Act and regulations, requiring the payment of prevailing wages on federally funded public works, restricts the apprentice wage to apprentices registered under federal standards. 29 C.F.R. § 5.5(a)(4) (1995). This could set up conflicting regulation both within a state and between states.

A third approach, used by California since the 1930's, is to use the same definition of apprentice on state public works as that used on federally funded public works subject to Davis-Bacon. The approach serves the purpose of conforming the state practice on state public works with the practice on federally funded public works, which simplifies things for contractors who bid on public works. This is especially useful since projects will sometimes acquire a federally funded character although initially planned as state funded. This third approach does not produce the kind of "conflicting" state law that Congress intended to preempt.

Thus, the states' near uniform practice of having apprentice rates in their prevailing wage laws and, when faced with the need to define an apprentice, their practice of adopting the federal definition of "registered" apprentice, has the kind of indirect economic effect on some ERISA-covered "plans, funds or programs" that Congress would not have understood to "relate to" them as that term is used in ERISA's preemption clause, § 1144(a).

II. The ERISA Federal Savings Clause Protects California's Law Which Carries Out The Goals Of The Federal-State Apprenticeship Scheme Under The Fitzgerald Act.

ERISA's federal savings clause ("savings clause"), § 514(d), 29 U.S.C. § 1144(d), reflects the fact that ERISA was not a deregulation of pension and welfare plans, compare, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374

(1992), but rather an attempt to establish plan regulation "as exclusively a federal concern." *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, 524 (1981). The savings clause provides that all other federal laws (except as specifically excepted) and all federal regulations and rules shall be preserved and not "alter[ed], amend[ed], modif[ied], invalidate[d], impair[ed], or supersede[d]" by ERISA.

One such federal law is the Fitzgerald Act of 1937, enacted to promote and extend labor standards necessary to safeguard the welfare of apprentices. As demonstrated earlier, Congress intended to accomplish this goal in large part by supporting and encouraging state programs for promoting apprenticeship. (*See, supra*, pp. 25-29.)

The Fitzgerald Act is the authority for the national apprenticeship regulations and rules issued in 1977. These regulations formalized the national policy on apprenticeship, and were designed to "set forth labor standards to safeguard the welfare of apprentices," and to "extend the application of such standards" both by formally clarifying the content of "standards" and written agreements, and by establishing a uniform set of procedures for registration of programs by state apprenticeship agencies, valid for multiple federal purposes. 29 C.F.R. § 29.1(b) (1995). In those 26 states approved under these regulations as State Apprenticeship Council states, the regulations avoid the need for a duplicative federal bureaucracy in an area of traditional state involvement.

Shaw v. Delta Airlines, 463 U.S. 85 (1983) recognized that where the federal scheme itself incorporates a role for the states, the savings clause necessarily protects that role from preemption; if it did not, then the federal law would certainly be "impaired" and "modified" by ERISA.

The Ninth Circuit held that the savings clause is not applicable here because, under *Shaw*, that clause serves to preserve state enactments only to the extent that there is a federal *enforcement* scheme that depends on state laws, i.e., if the state role under federal law is other than enforcing a federal requirement, the savings clause is inapplicable. *Shaw*, however, demonstrates that the determination of whether displacing a certain state law impairs federal law instead turns on analysis of the particular statutory scheme. *Shaw* concerned the joint federal-state enforcement effort set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

First, in analyzing Title VII, *Shaw* concluded that because of "the importance of state fair employment laws to the federal enforcement scheme, preemption of the Human Rights Law would impair Title VII to the extent that the Human Rights Law provides a means of enforcing Title VII's commands." 463 U.S. at 103-04. *Shaw* makes clear that the savings clause can protect state efforts where the states are not mandated to take action under federal law but do so voluntarily. *Shaw* noted that the federal agency that enforces Title VII depends on the states as willing partners in enforcing Title VII's non-discrimination provisions. Even though an employee would still have remedies through the EEOC, preemption would disrupt the joint federal-state enforcement scheme both because the EEOC workload would dramatically

increase and because there would be a less effective enforcement of Title VII. *Id.* at 103 n.23 and accompanying text. Either result constitutes sufficient "impairment" to invoke the savings clause.

In apprenticeship, likewise, the savings clause protects the states' actions in furtherance of the federal-state partnership embodied in the Fitzgerald Act. While the Fitzgerald Act affirmatively promotes apprenticeship and encourages the states to do so, and Title VII simply prohibits discrimination, that distinction is not significant because the savings clause speaks of "*any* law of the United States." The pertinent point is that *Shaw* found that the joint enforcement scheme was saved, including the states' efforts to promote access to redress for discrimination.

Second, *Shaw* also held that state discrimination laws prohibiting conduct not otherwise unlawful under Title VII are not saved from preemption. 463 U.S. at 103-04. But that holding was based on the fact that Title VII itself did not provide any general role for the states in promoting fair employment practices, but instead depended on state aid only in enforcing Title VII norms. 463 U.S. at 103. There is no indication in *Shaw* that the savings clause does not protect a federal scheme from impairment where a federal statute declares that the state role surpasses simple enforcement of federal standards, and encompasses as well state activities designed to affirmatively promote use of those federal standards.

For the following three reasons, the federal-state partnership embodied in the Fitzgerald Act's scheme and

that statute's articulated goal of promoting the furtherance of labor standards necessary to safeguard the welfare of apprentices would be profoundly impaired if state prevailing wage laws cannot distinguish between registered apprentices in programs which meet federal standards and unregistered apprentices.

1. Because government contracting rules normally require awards to the lowest bidder (JAMES ACRET, CALIFORNIA CONSTRUCTION LAW MANUAL 283 (4th ed. 1990)), transferring the state's authority to define apprentices to any contractor willing to set up an ERISA plan and use the name apprenticeship would set in motion a labor market distortion ruinous to the expressed congressional goals of the Fitzgerald Act and its implementing regulations. Such a judicially created rule makes it impossible for states to recognize any cost disadvantages to contractors who train apprentices up to the federal standards, and invest the supervisory and journey worker time for on-the-job training.

Under such a rule, a competing contractor can pay a lower apprentice wage to any worker whom he places in a generic unapproved program, which is less costly because it has no objective training standards, is thrown together for a single contract, lacks outside schooling or safety training, and allows an unlimited number of apprentices to work regardless of whether journey level workers are present to provide on-the-job training, but is covered by ERISA.

Because of this, if states cannot limit the apprentice rate on public works jobs to apprentices in registered programs, then their apprentice wage break will deprive

contractors who participate in registered programs, and their registered apprentices, of work opportunities. The effect of such a regime would be to *discourage* not encourage the inclusion of federal apprenticeship standards in contracts of apprenticeship.

2. In the long run, an equally severe impairment of the Fitzgerald Act and its implementing regulations will result from lower construction quality corresponding to the lower skill level of the work force caused by lower standards of training. With no guarantee of the quality of training, the state will have little incentive to pay contractors for unskilled work on the state's own projects. Although apprentices registered in state approved programs are, by definition, less skilled than the journey level workers, they are at least overseen by journey level workers on the state job and participate in ongoing classroom instruction. 29 C.F.R. § 29.5(b)(9) (1995). Unskilled workers in ad hoc informal programs, on the other hand, are not necessarily provided such supervision, and may produce work that is unsound or even dangerous. The states have been willing to allow apprentices to work on publicly funded projects although they are less skilled than journey level workers, since at least the contractor has a self-interest in teaching the apprentices to work up to high standards because the contractor must live with the consequences of the teaching beyond the one state-funded public work.

The likely result of preemption is that states will simply eliminate the apprenticeship wage on public works projects, thereby vastly constricting the on-the-job training opportunities for apprentices generally. Again,

such a result directly "impairs" the operation of the federal apprenticeship program by limiting the available training.

3. Additionally, if the 26 states that now voluntarily undertake the investigation, registration, and approval of programs authorized by BAT cannot use the resulting certification for any state purpose whatever (including, for example, determining which apprenticeship programs should receive state funds to support their educational programs), there remains little reason to devote state resources to so modest a role. Rather, if states are limited to the role of registrar for the federal government under Davis-Bacon and other statutes, then states may well find other more pressing uses for limited public resources.²³

The Fitzgerald Act and the cooperative scheme which its regulations create would be impaired if the states no longer volunteer for the apprenticeship registration work. Were the states to turn all apprenticeship responsibility to the federal BAT, the transfer would dramatically increase the scope of federal responsibility. The scope of the resulting additional burden on the federal government would be considerable.²⁴ Such a transfer of registration

²³ California also provides just under seven million dollars in support of the education of registered apprentices in the community college system. (*See, supra*, n.6.) It is unlikely that this financial support would continue if California were precluded from making any state law use of the registration concept and criteria.

²⁴ In California in 1991 the BAT had four professional staff to oversee 3,099 apprentices, while California's DAS had 79 professional staff and 47,663 apprentices. G.A.O., APPRENTICESHIP

responsibility to the federal government would directly impair both the general purpose of the Fitzgerald Act to encourage apprenticeship and the specific purpose of the Secretary's regulations, to establish and rely on state registration agencies.

Beyond the Fitzgerald Act, preemption would impair several other federal statutes, and future responses to the need for more effective training of skilled workers. The Davis-Bacon Act would be impaired. Davis-Bacon rules restrict the wage break on federal public works jobs to registered apprentices in approved programs. A different rule for state projects would create the absurd situation that ERISA, in the name of uniform administration for plans, creates one set of rules for a contractor working on a federal courthouse or jail and another set of rules when that same contractor goes across the street to wire the sound security system in, as here, the county jail. The complexity and absurdity of the pay classification problems for contractors would be magnified when a project which begins as state funded acquires federal support, and with that support, a different set of rules concerning apprentice wages. Also, once training slots are no longer reserved for registered apprentices on state public works jobs, their advancement in their craft will be vastly slower, creating a situation where, on federal public works jobs, the work of apprentices will be less skilled and the burden on contractors to provide training to them much greater.

TRAINING ADMINISTRATION, USE, AND EQUAL OPPORTUNITY, 20 (1992) (Staff); J.A. 96 (number of apprentices in 1990).

Additionally, numerous other federal laws depend on state registration of apprentices as a quality guarantee for the allocation of benefits or exceptions to regulations. (See, *supra*, n.19.) For example, veterans benefits are provided to veterans training in "registered" apprenticeship programs. 38 U.S.C. § 3687 (1994). If the states pull back from the registration process, or fail to encourage job opportunities for registered apprentices, all these laws, unrelated to benefit plans, will be impacted.

If states lose interest in apprenticeship at the time that apprenticeship is emerging as a critical educational tool, it will impair efforts to ready the American work force for the 21st century. See *Education Goals and Standards: Examining the Need to Improve National Education and Job Training Opportunities Before the Senate Comm. on Human Resources*, 103d Cong., 1st Sess. 13 (1993) (Secretary of Labor Robert Reich). Even as Congress considers returning more authority in the area of job training and education to the states, pending legislation, H.R. 1617, nonetheless Congress continues to focus on federal standards by relying on "registered apprenticeship programs." It is one method of assuring that federal money will not be channeled into worthless programs providing job training in name only and for the benefit of the program's organizers, rather than the trainees. *Id.* H.R. 1617, 104th Cong., 1st Sess. §§ 5, 107(f)(H); 110(p)(3)(E); 241(c)(6); 323(b)(3)(A)(II) (1995).

The Fitzgerald Act and the Secretary's regulations provide a model for a federal-state partnership that promotes but does not mandate.²⁵ Where the states, as here, are participating in an explicit partnership to carry out federal policy, based on express congressional intent, and decades of administrative practice, the states are not acting as interlopers. Elimination of the state role in apprenticeship would be devastating to the federal policy because of the effect it would have not only in increasing a federal workload, but also in transforming a partially state-based system into an entirely Washington-based system.



²⁵ In this respect it is similar to the cooperative relationship in the area of bankruptcy exemptions, in which the federal system depends on the state having its own exemption. State laws relating to the exempt status of pension funds have been held not preempted. *In Re Schlein*, 8 F.3d 745, 753 (11th Cir. 1993) (the bankruptcy law relies on state law to assist in the implementation of the policy choices made by Congress).

CONCLUSION

This Court should reverse the decision of the Ninth Circuit.

Dated: June 17, 1996, San Francisco, California

Respectfully submitted,

JOHN M. REA, Chief Counsel
(Counsel of Record)

VANESSA L. HOLTON
Asst. Chief Counsel

FRED D. LONSDALE
Sr. Counsel

JAMES D. FISHER, Counsel
SARAH COHEN, Counsel

State of California
Department of Industrial
Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105

(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 972-8900

*Counsel for State Petitioners
Department of Industrial
Relations Division of
Apprenticeship Standards*

H. THOMAS CADELL, JR.
Chief Counsel
RAMON YUEN-GARCIA
Counsel

State of California
Division of Labor
Standards Enforcement
45 Fremont Street,
Suite 3220
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 975-2060

*Counsel for State
Petitioners Division of
Labor Standards
Enforcement and County
of Sonoma*

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts a State's ability to regulate the wages of apprentices on state-funded public works projects.

PARTIES TO THE PROCEEDING

Respondent Dillingham Construction, N.A., Inc. is a privately held corporation. Its parent companies are Dillingham Construction Corporation and Dillingham Construction Holdings, Inc. A related subsidiary corporation is Dillingham Construction Canada, Ltd.

Respondent Manuel J. Arceo, dba Sound Systems Media is a sole proprietorship, not a corporation.

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STATEMENT OF THE CASE

I. THE STATE OF CALIFORNIA WAS ATTEMPTING TO REGULATE THE WAGES OF APPRENTICES WORKING ON A STATE-FUNDED PUBLIC WORKS PROJECT

In the Spring of 1987 Respondent Dillingham Construction became the general contractor for a state-funded public works contract known as the Sonoma County Main Adult Detention Facility. Pet. App. 25, 26 n.1. The electronic installation work was subcontracted to Respondent Manuel J. Arceo, doing business as Sound Systems Media (Sound Systems). Pet. App. 25.

When the subcontract was awarded to Sound Systems, it was signatory to a collective bargaining agreement with International Brotherhood of Electrical Workers Local 202 (Local 202). Pet. App. 26. The collective bargaining agreement contained a wage scale for apprentice electronic technicians and required Sound Systems to make contributions to an apprenticeship program known as the Northern California Sound and Communications Joint Apprenticeship Training Committee (Nor. Cal. JATC). Pet. App. 26. The Nor. Cal. JATC was approved by the California Apprenticeship Council. Pet. App. 26.

In May 1988, shortly after Sound Systems began working on the project, Local 202 disclaimed interest in representing the electronics technician employees of Sound Systems. Pet. App. 26. In response to this unexpected development, Sound Systems was forced to seek out another collective bargaining partner.

In June 1988, one month after the disclaimer of interest by Local 202, Sound Systems signed a new collective bargaining agreement with the National Electronic Systems Technicians Union (NESTU). Pet. App. 26. The NESTU collective bargaining agreement also contained an apprenticeship wage scale, and it created a new apprenticeship program, the Electronic and Communications Systems Joint Apprenticeship and Training Committee (E&C JATC). Pet. App. 26.

As noted by Petitioners, apprenticeship standards for the new E&C JATC were in place by June 20, 1988. R. 39. However, the California Division of Apprenticeship Standards did not approve the E&C JATC until August 15, 1989. J.A. 116-117. Final approval of the E&C JATC by the California Apprenticeship Council did not take place until September 19, 1990 because of objections filed by the Nor. Cal. JATC, the apprenticeship program sponsored by Local 202. J.A. 113-115.

In reliance on the NESTU collective bargaining agreement and the E&C JATC, Sound Systems employed apprentices to work on the Main Adult Detention Facility and paid them wages which were less than the state-approved prevailing wage rate for journeyman electronics technicians. Pet. App. 27. In response to a complaint filed by International Brotherhood of Electrical Workers Local 551, the Division of Labor Standards Enforcement issued a Notice to Withhold directing the County of Sonoma to withhold monies from Dillingham Construction. Pet. App. 27. The basis for the Notice was that the apprentices employed by Sound Systems were not participating in a state-approved apprenticeship program and Sound Systems was therefore not entitled to

pay them less than the prevailing wage rate for journeyman electronics technicians. Pet. App. 27-28; Pet. Br. 15-16.

II. THE PROCEEDINGS BELOW

In response to the Notice to Withhold, Respondents filed a complaint for declaratory relief alleging that the State's action was preempted by both the National Labor Relations Act (NLRA) and ERISA. J.A. 3-35. The district court granted summary judgment in favor of Petitioners (Pet. App. 23-52), but the Ninth Circuit reversed, holding that the State's application of its prevailing wage law to an ERISA apprenticeship program is preempted by ERISA. Pet. App. 1-22. Because the Ninth Circuit ruled in favor of Respondents on the ERISA preemption issue, it did not address the issue of NLRA preemption. Pet. App. 18.

SUMMARY OF ARGUMENT

All aspects of an apprenticeship program such as the E&C JATC constitute an employee welfare benefit plan within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1). This conclusion is dictated by the plain language of section 3(1), which provides that an employee welfare benefit plan is "any plan, fund or program . . . established or maintained . . . for the purpose of providing . . . apprenticeship or other training programs. . . ." 29 U.S.C. § 1002(1). The purposes of ERISA, the regulations issued by the Secretary of Labor pursuant to ERISA and the

limited legislative history are all consistent with the literal language of § 3(1). Finally, there is no dispute among the lower courts that an apprenticeship program, and not merely its funding mechanism, is an employee welfare benefit plan entitled to the protections of ERISA's preemption provision.

The prevailing wage statute which Petitioners seek to enforce, Cal. Lab. Code § 1777.5 (Pet. App. 58-63), satisfies the "relate to" test of ERISA's preemption clause, 29 U.S.C. § 1144(a). Consistent with the decisions of this Court, the statute is presumptively preempted because it "specifically refers to" ERISA apprenticeship plans, it mandates the specific benefits which must be provided by an apprenticeship plan on state-funded public works projects, and it is "specifically designed to affect" apprenticeship programs. Because the E&C JATC is the product of collective bargaining, the federal interest in preemption is heightened. *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504, 525-26 (1981). Failure to apply ERISA's preemption provision would subject apprenticeship programs, particularly multi-state apprenticeship programs, to conflicting and inconsistent state regulations.

California's prevailing wage statute is not "saved" from preemption because it is not a means of enforcing the federal Fitzgerald Act, 29 U.S.C. § 50. The Fitzgerald Act does not require or prohibit any conduct and therefore it does not contain any commands which are capable of being enforced by a state law. *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555, 1562 (10th Cir. 1992), *cert. denied*, 506 U.S. 953 (1992).

If ERISA's savings clause has any application to this case, it merely saves the regulations issued by the Secretary of Labor pursuant to the Fitzgerald Act. 29 C.F.R. § 29.1, *et seq.* Pursuant to those regulations, an approved State Apprenticeship Council may approve an apprenticeship program solely for *federal purposes*. See *e.g.*, 29 C.F.R. § 29.2(l) and (o). Thus, a State Apprenticeship Council may approve an apprenticeship program for *federal purposes* such as eligibility to work on a federally-funded Davis-Bacon project. However, a state may not exercise its approval authority for *state purposes* such as eligibility to work on a state-funded public works project.

ARGUMENT

I. THE E&C JATC, IN ALL ITS ASPECTS, IS AN EMPLOYEE WELFARE BENEFIT PLAN GOVERNED BY ERISA

A. The Lower Courts Have Consistently Ruled That All Aspects Of An Apprenticeship Program Constitute An Employee Welfare Benefit Plan

The United States and amicus AFL-CIO would have this Court believe that the threshold issue – whether or not a jointly administered apprenticeship program is an ERISA employee welfare benefit plan – is an issue of first impression not only for this Court, but for the lower courts as well. In fact, this issue has been addressed by numerous federal courts and several state courts.

Without exception, all of the courts which have addressed this issue have ruled that an apprenticeship program or training program is an employee welfare benefit plan within the meaning of ERISA § 3(1), 29

U.S.C. § 1002(1). No lower court has limited ERISA coverage to the funding mechanism for an apprenticeship program as amicus AFL-CIO would do, or to funded apprenticeship programs as the United States would do. See, e.g., *Keystone Chapter, ABC v. Foley*, 37 F.3d 945, 954 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995); *National Elevator Industry Inc. v. Calhoon*, 957 F.2d 1555, 1561 (10th Cir. 1992), *cert. denied*, 506 U.S. 953 (1992) (the National Elevator Industry Education Program "is undisputedly an ERISA employee benefit plan"); *Hydrostorage v. Northern Cal. Boilermakers*, 891 F.2d 719, 727-28 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990); *Citrin v. Erikson*, 911 F. Supp. 673, 680 (S.D.N.Y. 1996); *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 439-40, 14 Cal. Rptr. 491 (1992); *Operating Engineers & Participating Employees v. Weiss Bros. Construction Co.*, 221 Cal. App. 3d 867, 879, 270 Cal. Rptr. 786 (1990).¹

In several other cases, the state agency defending an ERISA preemption attack has conceded that an apprenticeship program is, without limitation, an employee welfare benefit plan governed by ERISA. See *Boise Cascade Corp. v. Peterson*, 939 F.2d 632, 637 (8th Cir. 1991) ("the

¹ The foregoing is only a partial listing of the Ninth Circuit decisions holding that an apprenticeship program is an ERISA employee welfare benefit plan. See also *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270, 274 (9th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992); *Associated General Contractors, San Diego Chapter, Inc. v. Smith*, 74 F.3d 926, 929 (9th Cir. 1996); *WSB Electric, Inc. v. Curry*, Nos. 94-16613, 94-16646, 1996 U.S. App. LEXIS 16027 (9th Cir. July 5, 1996).

state [of Minnesota] has conceded that plaintiffs' pipefitter apprenticeship programs are 'employee welfare benefit plans' as defined by ERISA"), *cert. denied*, 112 S. Ct. 3014 (1991); *Minnesota Chapter, ABC v. Minnesota Dept. of Labor*, 47 F.3d 975, 980 (8th Cir. 1995) (same); *Associated Builders and Contractors v. Perry*, 817 F. Supp. 49, 51 (E.D. Mich. 1992) (concession by Michigan Department of Labor), appeal dismissed for lack of standing, 16 F.3d 688 (6th Cir. 1994).

Several courts which have addressed this issue have squarely held that all aspects of an apprenticeship program, not merely the funding mechanism, comprise an employee welfare benefit plan entitled to the protections of ERISA's preemption provision. In *Hydrostorage v. Northern Cal. Boilermakers*, the same parties who are Petitioners in this case argued that ERISA applies to an apprenticeship trust fund, but not to the apprenticeship standards dealing with matters such as minimum qualifications for apprentices, apprentice to journeyman ratios, terms and conditions of apprenticeships and wages and hours of apprentices. In rejecting this narrow definition of an employee welfare benefit plan, the Ninth Circuit relied on the literal language of the statute (29 U.S.C. § 1002(1)) and the lack of statutory definition or legislative history. *Hydrostorage*, 891 F.2d at 727. The court also observed that "[t]he Standards are an integral part of a larger 'program' established for the purpose of providing 'apprenticeship . . . training.'" *Hydrostorage*, 891 F.2d at 728. Other courts have reached the same conclusion in cases involving the same parties who are Petitioners in this case. See *Southern California Chapter, ABC v. California*

Apprenticeship Council, 4 Cal. 4th at 440; *Operating Engineers & Participating Employees v. Weiss Bros. Construction Co.*, 221 Cal. App. 3d at 875-77.

It is therefore not surprising that Petitioners did not raise or argue this issue in their petition for writ of certiorari or their brief on the merits. In fact, in their reply brief in support of the petition for writ of certiorari, Petitioners did not quarrel with Respondents' statement of the Question Presented by this case:

Does the Employee Retirement Income Security Act of 1974 (ERISA) preempt a State's ability to enforce its prevailing wage laws, contrary to the terms of an apprenticeship program *which constitutes an employee welfare benefit plan within the meaning of ERISA*.

Resp. Br. in Opp. (emphasis added).

It is also noteworthy that Petitioners effectively conceded this issue in the district court and before the Ninth Circuit. In its two briefs to the Ninth Circuit, Petitioner Division of Apprenticeship Standards devoted a single footnote to this issue. Br. of Appellees 12 n. 10.

In short, the United States and amicus AFL-CIO are inviting this Court to address an issue as to which there is no disagreement in the lower courts and which was not vigorously litigated in this case before either the district court or the court of appeals.

B. The Plain Language Of ERISA Mandates The Conclusion That All Aspects Of The E&C JATC Are An Employee Welfare Benefit Plan

In interpreting ERISA's express preemption provision, this Court has stated that effect must be given to the plain language of the statute "unless there is good reason to believe Congress intended the language to have some more restrictive effect." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). The relevant statutory language is contained in ERISA § 3(1), which provides that:

The terms "employee welfare benefit plan" and "welfare plan" mean any *plan, fund, or program* which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such *plan, fund, or program* was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . *apprenticeship or other training programs, . . .* or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1) (emphasis added).

In the context of this case, the plain language of ERISA § 3(1) is easy to restate: an employee welfare benefit plan includes any "plan, fund or program" established or maintained for the purpose of providing "apprenticeship or other training programs" for its participants. As this Court observed in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987), the express language of

ERISA presents a "formidable obstacle" to the positions advanced by the United States and amicus AFL-CIO.

The above-quoted definitional section is doubly formidable because of subsection (B). Under that provision, the "purpose" of a plan, fund or program governed by ERISA includes "any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions)." 29 U.S.C. § 1002(1)(B). One of the many benefits described in section 186(c) of Title 29 is "apprenticeship or other training programs." 29 U.S.C. § 186(c)(6). Speculation aside, there is no hard evidence that Congress intended ERISA section 3(1) to have a more restrictive effect than its plain language would suggest. Most importantly, ERISA does not further define a "plan, fund or program" or the term "apprenticeship or other training programs." *Massachusetts v. Morash*, 490 U.S. 107, 114 (1989). The regulations issued by the Secretary of Labor pursuant to ERISA also fail to define the relevant terms. *Hydrostorage*, 891 F.2d at 727; see 29 C.F.R. § 2510.3-1 (1988).²

Given the lack of statutory and regulatory definition, the courts which have considered this threshold issue have applied the literal language of section 3(1) to find that all aspects of an apprenticeship or training program comprise an employee welfare benefit plan subject to

² Although the regulations issued by the Secretary of Labor pursuant to ERISA are decidedly unhelpful in construing the term "employee welfare benefit plan," the Secretary's own regulations issued pursuant to the Fitzgerald Act, 29 U.S.C. § 50, are consistent with the expansive interpretation suggested by the plain language of ERISA. See section I(D) below.

ERISA. In *Hydrostorage*, the Ninth Circuit relied on the literal language of section 3(1) in concluding that the Apprenticeship Program administered by the Northern California Boilermakers Joint Apprenticeship Committee is an employee welfare benefit plan. 891 F.2d at 727. Quoting the district court (Schwarzer, J.), the court explained:

There can be no question that the Apprenticeship Program under the Boilermakers collective bargaining agreement falls within the literal scope of [29 U.S.C. § 1002(1)'s] definition. It comprises a plan, fund, and program maintained by employers and the bargaining representative of their employees to provide its participants with apprenticeship training. That the Apprenticeship Fund itself may also be governed to an extent by other federal laws, as [the Division] argues, in no way takes the Apprenticeship Program out of the statutory definition.

Id. at 727. Applying the dictionary definitions of plan, fund and program, the Ninth Circuit also concluded that the Apprenticeship Standards governing apprentice training satisfy the definition of an ERISA plan. *Id.* at 728.

Similarly, in *National Elevator Industry, Inc. v. Calhoon*, the Tenth Circuit relied on the "clear language of the statute" in concluding that the National Elevator Industry Education Program (NEIEP), a national helpers' training program, is an employee welfare benefit plan. 957 F.2d at 1558. The court noted that the NEIEP is "administered by a board of trustees; it receives regular contributions from employers and exists for the exclusive benefit of employees." *Id.*

The statutory construction urged on the Court by amicus AFL-CIO would read out of section 3(1) the words "plan" and "program." In effect, the Court is being asked to judicially rewrite section 3(1) to define an employee welfare benefit plan as a "fund" established for the purpose of providing apprenticeship or other training.

The result of such a statutory interpretation would be to have one definition of an ERISA plan for purposes of providing apprenticeship or other training and a different definition for purposes of other enumerated benefits. A "plan" or "program" established for the purpose of providing sickness or vacation benefits would be an employee welfare benefit plan, but a "plan" or "program" established for the purpose of providing apprenticeship or other training would not. Needless to say, the same words cannot have two different and contradictory meanings in the context of a single statute.

This Court rejected a similar attempt to rewrite the express language of ERISA in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). The appellant argued that the Maine statute mandating severance pay to employees affected by a plant closing was preempted because it related to a type of *benefit* listed in ERISA. 482 U.S. at 7. Applying the literal language of ERISA's preemption provision, 29 U.S.C. § 514(d), the Court noted that it preempts state laws relating to any "employee benefit plan" not state laws relating to any "employee benefit." *Id.* This Court therefore declined the invitation to read the word "plan" out of ERISA's preemption provision. 482 U.S. at 8. The AFL-CIO's invitation to read the words "plan" and "program" out of ERISA § 3(1) must also be declined.

Similarly, the United States would rewrite ERISA § 3(1) to define an employee welfare benefit plan as a "funded" plan or program established for the purpose of providing apprenticeship or other training. Nowhere in the statutory text is there any indication that a plan or program must be *funded* in order to qualify as an employee welfare benefit plan. Indeed, the disjunctive nature of the phrase "plan, fund or program" suggests just the opposite. Many employee welfare benefit plans are "unfunded" in the sense that they are paid out of an employer's general assets. *See, e.g.*, 29 C.F.R. § 2520.104-20(b)(2).

This Court recently had occasion to observe that a straightforward, natural reading of a statutory provision must always prevail over the speculative possibility that a legislative oversight occurred. *United Food & Commercial Workers Union, Local 751 v. Brown Group, Inc.*, ___ U.S. ___, 116 S. Ct. 1529, 1533 (1996). The statutory constructions advocated by the United States and amicus AFL-CIO are precisely the type of speculative possibilities that this Court refused to endorse in *Brown*.

In *Hydrostorage*, some of these same Petitioners and same counsel made the identical argument which amicus AFL-CIO is advancing here – that only an apprenticeship *fund* qualifies as an employee welfare benefit plan. The Ninth Circuit refused the invitation to "eschew a literal interpretation of ERISA's definition and defer instead to Congress's broader purpose behind the statute." 891 F.2d at 728. The court further observed that the State of California's "argument is essentially one for statutory revision and is properly directed to the Legislative Branch." *Id.*, citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 106.

C. A Literal Reading Of Section 3(1) Is Consistent With The Purposes Of ERISA

Congress had many purposes in passing ERISA. One purpose was to safeguard employees from the abuse and mismanagement of funds that are accumulated to finance various types of benefits. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 15. If that were the sole purpose of ERISA, a narrow, non-literal reading of § 3(1) might have some appeal. However, Congress had other purposes in enacting ERISA, and those other purposes are consistent with the literal definition of an employee welfare benefit plan set forth in section 3(1).

The Congressional declaration of policy set forth in ERISA states that:

It is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of such [employee benefit] plans.

29 U.S.C. § 1001(a). Based on this Congressional declaration of policy, this Court observed in *Fort Halifax* that "[t]he focus of the statute is on the administrative integrity of benefit plans, which assumes that some type of administrative activity is taking place." 482 U.S. at 15.

An apprenticeship program, like other types of ERISA plans, involves ongoing administrative activities. Funds must be collected and disbursed, training standards and qualifications must be established and administered, supplemental instruction must be provided, and employees must be hired to perform these tasks. This is one of many reasons why apprenticeship programs are

covered by ERISA. *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1558; *Keystone Chapter, ABC v. Foley*, 37 F.3d at 954.

Another Congressional purpose in enacting ERISA was to protect participants in employee benefit plans "by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto" 29 U.S.C. § 1001(b). Although apprenticeship programs can be exempted from ERISA's reporting requirements (29 C.F.R. § 2520.104-22), the salutary effects of reporting and disclosure requirements and fiduciary standards of conduct are equally applicable to apprenticeship programs. If amicus AFL-CIO were to prevail on this threshold issue, fiduciary standards would apply to the financial aspects of an apprenticeship fund, but nothing more. If the United States were to prevail, unfunded apprenticeship programs would not be subject to fiduciary standards. Either way, the interests of employees in receiving apprenticeship training and instruction would be threatened.

Another overriding purpose of ERISA is to protect employee benefit plans from "the threat of conflicting or inconsistent state and local regulation of employee benefit plans." 120 Cong. Rec. 29933 (1974). See *Fort Halifax*, 482 U.S. at 9. Many apprenticeship programs operate on a multi-state basis. See *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1558 (NEIEP is a "national" training program for helpers in the elevator industry); *ABC, National Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343, 345 (9th Cir. 1995) (the apprenticeship trust was headquartered in Florida and provided training

to an Oregon corporation performing a state public works project in California). The statutory interpretation urged by amicus AFL-CIO would expose all multi-state apprenticeship programs to the threat of conflicting regulations.

D. The Secretary Of Labor's Own Regulations Support A Literal Reading Of Section 3(1)

Although the regulations issued by the Secretary of Labor pursuant to ERISA will not assist the Court in determining whether all aspects of an apprenticeship program constitute an employee welfare benefit plan, the regulations issued pursuant to the Fitzgerald Act, 29 U.S.C. § 50, are of considerable assistance. The Fitzgerald Act regulations contain the following definition of an "apprenticeship program":

Apprenticeship program shall mean a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, including such matters as the requirement for a written apprenticeship agreement.

29 C.F.R. § 29.2(f).

The words "program" and "plan" in the foregoing regulation are used in a way which is totally inconsistent with the statutory interpretations of "plan, fund or program" offered by the United States and amicus AFL-CIO. As used in the regulation, the words "program" and "plan" have an expansive meaning, encompassing all

aspects of an apprenticeship program such as qualification, recruitment, selection, employment and training. That expansive meaning cannot be reconciled with the AFL-CIO's view that a "plan, fund or program," as that term is used in ERISA § 3(1), is limited to the funding mechanism for an apprenticeship program. Similarly, the regulation does not distinguish between funded and unfunded apprenticeship programs.

One of the few ERISA regulations which deals specifically with apprenticeship and training programs is 29 C.F.R. § 2520.104-22. It provides an exemption from ERISA's reporting and disclosure requirements for an "employee welfare benefit plan" which exclusively provides "apprenticeship training benefits or other training benefits." The unstated premise of that regulation is that, in the apprenticeship context, an employee welfare benefit plan includes far more than the funding mechanism; it also includes the course of study and the procedures for delivering that course of study. *See* 29 C.F.R. § 2520.104-22(b).

Counsel for Respondent is aware of only two Labor Department Advisory Opinions applying the requirements of ERISA to an apprenticeship or training program. U.S. Dept. of Labor ERISA Advisory Op. No. 76-03 (March 17, 1976); U.S. Dept. of Labor ERISA Advisory Op. No. 86-27A (Dec. 15, 1986). In each Advisory Opinion, the Secretary of Labor assumed that various aspects of apprenticeship and training plans are subject to the requirements of ERISA. In neither Advisory Opinion does the Secretary of Labor distinguish between the funding mechanism for an apprenticeship program and the other

aspects of an apprenticeship program. Nor does the Secretary draw any distinction between funded and unfunded apprenticeship programs. If the distinctions advanced by the United States and the AFL-CIO had any basis in legislative intent, one would have expected them to be reflected in these Advisory Opinions.

E. The Secretary Of Labor's Payroll Practice Regulation Does Not Support A Narrow Interpretation Of Section 3(1)

The payroll practice regulation so heavily relied upon by the United States and the AFL-CIO is, by its very terms, inapplicable to this case. The regulation provides that the payment of certain types of compensation, *out of the employer's general assets*, does not constitute an employee welfare benefit plan. 29 C.F.R. § 2510.3-1(b)(3). However, the E&C JATC, like most jointly administered apprenticeship programs, does not rely solely on payments from the general assets of participating employers. It is a multiemployer fund which pools the contributions from many different employers to create a fund and a program which is separate and distinct from each individual employer.

The United States would have the Court ignore the clear and specific limiting language of the payroll practice regulation. If the Secretary of Labor truly intended to exempt all apprenticeship and training programs from the definition of an employee welfare benefit plan, the regulation would not have been limited to payments "out of the employer's general assets." This also disposes of the United States' reliance on 29 C.F.R. § 2510.3-1(k)

(unfunded scholarship programs), since that regulation is also limited to programs "under which payments are made solely from the general assets of an employer or employee organization."

In the context of an apprenticeship or training program, the term "payments of compensation," as used in the payroll practice regulation, makes very little sense. The payments by an apprenticeship fund are generally to instructors and trainers, not for "periods of time during which an employee performs little or no productive work while engaged in training," but rather as compensation for the training and instruction provided.

In applying the payroll practice regulation to an unfunded vacation policy in *Massachusetts v. Morash*, 490 U.S. 107 (1989), this Court emphasized that ordinary vacation payments do not present any of the risks that ERISA is intended to address. Ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control. 490 U.S. at 115. In contrast, vacation payments subject to ERISA are "those vacation benefit funds . . . in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk." 490 U.S. at 116 (emphasis added).

Apprenticeship and training benefits, like ERISA vacation funds, involve a substantially greater risk than the ordinary risk of employment. If an apprenticeship program is not well run and administered, there is a risk that apprenticeship benefits will have minimal value, or possibly, that the apprenticeship program will collapse,

leaving the apprentices without any formal training whatsoever. *Southern California Chapter, ABC v. Aubry*, 4 Cal. 4th at 440 ("it is obvious that an apprentice incurs a risk different from the risk of ordinary employment").

In *Morash*, this Court emphasized that its decision was limited to vacation payments by a single employer out of its general assets. A different situation would have been presented, the Court observed, "if a separate fund had been created by a group of employers to guarantee the payment of vacation benefits to laborers who regularly shift their job from one employer to another." 490 U.S. at 120. In that case, "employees who are beneficiaries of such a trust face far different risks and have far greater need for reporting and disclosure requirements. . . ." *Id.*

The E&C JATC and similar multiemployer apprenticeship programs pose the same risks as multiemployer vacation funds. Thus, neither the plain language nor the underlying rationale of the payroll practice regulation supports a narrow definition of an employee welfare benefit plan.

F. ERISA's Limited Legislative History Is Consistent With The Plain Language Of Section 3(1)

1. The 1973-1974 Legislative History

Several early drafts of the legislation that was ultimately enacted as ERISA included the term "employee benefit fund" within their definitional sections. For example, S.4 (January 4, 1973) defined the term as follows:

The term 'employee benefit fund' or 'fund' means a fund of money or other assets maintained pursuant to or in connection with an employee benefit plan and includes employee contributions withheld but not yet paid to the plan by the employer. The term does not include. . . .

Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, Legislative History of the Employee Retirement Income Security Act of 1974 at 147 (hereinafter "Legislative History of ERISA").

Virtually identical definitions of an "employee benefit fund" appeared in subsequent drafts of the proposed legislation. *Id.* at 284, 542, 958-59, 1413, 3744. The term "employee benefit fund" sometimes existed side by side with a definition of "employee benefit plan" or "employee welfare benefit plan" very similar to the text of ERISA § 3(1). *Id.* at 958.

As ultimately enacted by Congress, ERISA does not use "employee benefit fund" as a defined term. Thus, the drafters of ERISA considered, but did not adopt, a definition of "employee benefit fund" which closely corresponds to how the AFL-CIO would define the term "employee welfare benefit plan" in an apprenticeship context. The Congressional omission of such a term which was expressly before it in proposed legislation is significant. *Mackey v. Lanier Collections Agency*, 486 U.S. 825, 837 (1988).

ERISA's Legislative History contains a brief but revealing explanation of why the term "employee welfare benefit plan" includes apprenticeship and training programs. In an executive meeting on March 20, 1973, the

Senate Committee on Labor and Public Welfare adopted three amendments, including:

An amendment offered by Senator Javits extending coverage of the fiduciary and disclosure amendments to the WPPDA [Welfare Pension Plans Disclosure Act] to all *benefit arrangements* described in or permitted by Section 302 of the Taft-Hartley Act. These *benefit arrangements* would include jointly administered vacation funds, *apprenticeship training funds*, day care centers, scholarship funds, etc. (Sec. 503).

Legislative History of ERISA at 601, 635-36 (emphasis added.)

The choice of the term "benefit arrangements" is significant. It strongly suggests that Senator Javits' amendment was intended to bring all "arrangements" for providing apprenticeship and training benefits within the protection of ERISA, and not merely the trust funds which are used to fund those benefits.

2. The Congressional Failure To Amend ERISA To Overrule *Hydrostorage* Is Instructive Regarding Congressional Intent

In response to the Ninth Circuit's decision in *Hydrostorage* and other cases which applied ERISA's preemption provision to apprenticeship programs, legislation was introduced in both the House and the Senate in 1993 for the express purpose of overruling those decisions. See H.R. 1036, 103rd Cong., 1st Sess. (1993); S. 1580, 103rd Cong., 1st Sess. (1993). Those bills would have amended ERISA to provide that ERISA does not preempt state laws establishing minimum standards and regulating certified

apprenticeship programs. See 139 Cong. Rec. H. 8958 (1993) (statement of Rep. Beilenson introducing H.R. 1036). The bills were in direct response to the Ninth Circuit's *Hydrostorage* decision. See 139 Cong. Rec. H. 8961. Many of the interested parties which are appearing as *amici* in this case, including the AFL-CIO, the National Association of State Apprenticeship Directors, the National Association of Attorneys General and the National Electrical Contractors Association, were supporters of the proposed legislation. See 139 Cong. Rec. H. 8960.

H.R. 1036 passed the House in 1993. 139 Cong. Rec. H. 8977. However, the bill never emerged from the Senate and never became law. 140 Cong. Rec. D. 230, 233 (Mar. 10, 1994) (digest entry regarding the recess of Senate hearings on H.R. 1036 and S. 1580 subject to call).

Congressional failure to act on a proposed amendment of a disputed statutory provision is "instructive" but not conclusive. *Bowsher v. Merck & Co.*, 460 U.S. 824, 837 n.12 (1983); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989). In *Bruch*, the Court refused to ascribe significance to Congress's failure to amend ERISA after most federal courts had adopted an arbitrary and capricious standard of review. Prior to the *Bruch* decision, ERISA was silent on the appropriate standard of review. 489 U.S. at 109.

This is a far stronger case than *Bruch* or *Bowsher* for ascribing significance to Congress's failure to pass a proposed amendment. ERISA is not silent regarding the definition of an "employee welfare benefit plan." For 22 years now, the statute has provided that an employee welfare

benefit plan includes a "plan, fund or program . . . established or maintained for the purpose of providing . . . apprenticeship or other training programs. . . ." 29 U.S.C. § 1002(1). Given the plain language of section 3(1) and the numerous judicial decisions interpreting that language literally, the Senate's refusal to pass H.R. 1036 or S. 1580 must be seen as a considered decision not to amend the key definitional term in ERISA. Coupled with the plain language of the statute, the uniform judicial interpretations of section 3(1), the statutory purposes and the other legislative history, Congress's failure to overrule *Hydrostorage* is both instructive and significant.

II. CALIFORNIA'S PREVAILING WAGE LAW RELATES TO ERISA APPRENTICESHIP PLANS

A. ERISA's Preemption Clause Must Be Given An Expansive Interpretation, Notwithstanding This Court's Decision In *Travelers*

This Court's pronouncements regarding ERISA's preemption clause, 29 U.S.C. § 1144(a), are familiar and frequently applied. They bear repeating only because of Petitioners' argument that *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671 (1995) constitutes a radical change in ERISA preemption analysis.

ERISA section 514(a) is a "virtually unique" preemption provision, *Franchise Tax Board v. Laborers Vacation Trust Fund*, 463 U.S. 1, 29 n.26 (1983), which is "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). The "deliberately expansive" language of ERISA's preemption clause was "designed to 'establish

pension plan regulation as exclusively a federal concern.'" *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

Although preemption is ultimately a question of Congressional intent, this Court has stated that it will give effect to the plain language of ERISA section 514(a) "unless there is good reason to believe Congress intended the language to have some more restrictive effect." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). The key phrase in section 514(a) consists of the words "relate to." "Congress used those words in their broad sense, rejecting more limited pre-emption language that would have made the clause 'applicable only to state laws relating to the specific subjects covered by ERISA.'" *Ingersoll Rand*, 498 U.S. at 138 (quoting *Shaw*, 463 U.S. at 98).

In *Shaw*, this Court explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." 463 U.S. at 96-97. Although the "relate to" clause is clearly expansive, there are limits to the reach of the preemption clause. *Travelers*, 115 S. Ct. at 1677. Thus, ERISA does not preempt a state law which has only a "tenuous, remote or peripheral connection" with covered plans, as is the case with many laws of general applicability. *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 113 S. Ct. 580 n.1 (1992).

In *Shaw* and subsequent cases, this Court developed several standards for determining if a state law is presumptively preempted by ERISA. If a state law is presumptively preempted, the inquiry ends there and the preemption analysis employed in *Travelers* does not come into play. As explained below, application of California's

prevailing wage law in the context of this case is presumptively preempted by ERISA and the *Travelers* preemption analysis is therefore inapplicable. Stated differently, the *Travelers* analysis enables a court to determine if a state law has only a "tenuous, remote or peripheral" connection with an ERISA plan; it is not to be utilized in every case and it does not constitute a dramatic shift in ERISA preemption analysis.

B. The Application Of California's Prevailing Wage Law Is Presumptively Preempted Because It "Refers To" ERISA Plans

Where a state law "specifically refers to" employee welfare benefit plans regulated by ERISA, the state law is preempted "on that basis alone." *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. at 583. The continuing vitality of this rule was reaffirmed in *Mackey v. Lanier Collections Agency*, 486 U.S. at 829.

Travelers did not alter the "reference to" strand of ERISA preemption analysis. The Court in *Travelers* was careful to point out that the New York statute at issue did not make "reference to" an ERISA plan. 115 S. Ct. at 1677. As a result, it was necessary for the court to determine if the New York surcharge law had a "connection with" ERISA plans, an inquiry that is not necessary in this case.

California's prevailing wage statute at issue in this case, Labor Code section 1777.5 (Pet. App. 58-63), specifically refers to employee welfare benefit plans (apprenticeship programs) in numerous ways. It permits the employment of apprentices on state-funded public works

projects, subject to stringent conditions. Apprentices on state public works projects must be paid the "standard wage" paid to apprentices under the regulations of the craft or trade at which he or she is employed. Pet. App. 58. Most importantly, only apprentices who are in training under apprentice standards and written apprentice agreements approved by the California Apprenticeship Council are eligible to be employed on state-funded public works projects. *Id.* The employment and training of each apprentice must be in accordance with the same apprentice standards and written apprentice agreements. *Id.* Virtually every provision and every sentence of § 1777.5 makes express reference to joint apprenticeship committees, apprentice standards and the terms on which apprentices may be employed on state public works projects. Since apprenticeship programs, including apprentice standards, constitute employee welfare benefit plans, section 1777.5 "specifically refers to" ERISA plans.

The California Supreme Court, in a very similar context, had no difficulty in concluding that Labor Code section 1777.5 "expressly refer[s] to apprenticeship programs including their standards." *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th at 441. On that basis alone, section 1777.5 "relates to" an ERISA-regulated apprenticeship plan. *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. at 583.

C. California Labor Code Section 1777.5 Is Presumptively Preempted Because It Mandates Benefits To Be Provided By An ERISA Apprenticeship Program

A state law which requires an employer to provide "specific benefits" through an employee welfare benefit plan relates to an ERISA plan. *Shaw*, 463 U.S. at 97. In *Shaw*, New York's Disability Benefits Law "related to" employee welfare benefit plans because it required employer-sponsored health plans to provide sick leave benefits to employees unable to work on account of pregnancy and other nonoccupational disabilities. See also *FMC Corp. v. Holliday*, 498 U.S. at 59 ("state laws . . . requiring plans to provide specific benefits 'relate to' benefit plans").

This principle is implicit in the definitional section of ERISA's preemption provision. ERISA section 514(c)(2) provides that:

The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the *terms and conditions* of employee benefits plans covered by this subchapter.

29 U.S.C. § 1144(c)(2) (emphasis added). Although this limiting language does not mean that ERISA preempts only those state laws which purport to regulate the "terms and conditions" of benefit plans, *Ingersoll Rand v. McClenáon*, 498 U.S. at 141, the converse is true: ERISA most definitely preempts state laws which do regulate the terms and conditions of ERISA plans.

Again, *Travelers* did not disturb the validity of this presumptive rule. In distinguishing *Shaw v. Delta Air Lines*, *FMC Corp. v. Holliday* and *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504 (1981), the Court in *Travelers* observed that "[i]n each of these cases, ERISA preempted state laws that mandated employee benefit structures or their administration." 115 S. Ct. at 1678.

California Labor Code section 1777.5 mandates that various benefits be provided by ERISA-regulated apprenticeship programs. As this case clearly shows, section 1777.5 regulates the wages which must be paid to apprentices on state public works projects. Wages are essential terms and conditions of an apprenticeship program. In addition, section 1777.5 dictates the type and amount of training received by apprentices, the standards and written agreements under which apprentices receive their training, the hours worked by apprentices and the ratio of apprentices to journeymen. Pet. App. 56-63. All of these affect the amount and the quality of the benefits (training) received by apprentices pursuant to an apprenticeship program.

For this reason, the lower courts have ruled that Labor Code section 1777.5 and similar statutes "relate to" ERISA apprenticeship plans. The California Supreme Court stated that section 1777.5 and related statutes "prescribe minimum terms and conditions for apprenticeship training that programs must meet in order to be eligible for approval and thus for certain financial benefits." *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th at 441. In *Boise Cascade Corp. v. Peterson*, 939 F.2d at 637, the Eighth Circuit similarly

concluded that a state-mandated apprentice to journeyman ratio "relates to" ERISA covered apprenticeship programs.

This strand of ERISA preemption analysis is dictated by the structure of ERISA. The statute does not regulate the substantive content of employee welfare benefit plans and does not require employers to provide any given set of minimum benefits. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985); *Travelers*, 115 S. Ct. at 1674. ERISA leaves it up to private parties, not the government, to determine the level of benefits provided by employee welfare benefit plans. *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. at 511. State laws such as section 1777.5 which set the level of benefits which must be provided by an ERISA plan interfere with one of the central tenets of ERISA.

D. Labor Code Section 1777.5 Is Presumptively Preempted Because It Is "Specifically Designed" To Affect ERISA Apprenticeship Programs

This Court has "virtually taken it for granted" that state laws which are "specifically designed to affect employee benefit plans" are preempted by ERISA. *Mackey v. Lanier Collection Agency*, 486 U.S. at 829; *Ingersoll Rand Co. v. McClendon*, 498 U.S. at 140. In *Ingersoll Rand*, for example, the state law cause of action under scrutiny was premised on the existence of a pension plan. 498 U.S. at 140.

For the very same reasons that Labor Code section 1777.5 "refers to" ERISA apprenticeship programs, the

statute is "specifically designed" to affect such plans. Indeed, the "specifically designed to affect" strand of ERISA preemption analysis may be simply a restatement of the "refers to" test set forth in *Shaw*. As in *Ingersoll Rand*, section 1777.5 is premised on the existence of apprenticeship programs covered by ERISA.

Examining a different aspect of Labor Code section 1777.5, the Ninth Circuit concluded that the statute is "specifically designed to affect" ERISA apprenticeship programs. *Hydrostorage*, 891 F.2d at 730. In that case, the State of California was applying section 1777.5 to force a nonunion employer to comply with an apprenticeship plan and apprenticeship standards established pursuant to collective bargaining. *Id.* at 723; see also *Boise Cascade Corp. v. Peterson*, 939 F.2d at 637 (state mandated apprentice to journeyman ratio was specifically designed to affect ERISA apprenticeship programs).

E. The Fact That The E&C JATC Is The Product Of Collective Bargaining Militates Strongly In Favor Of A Finding Of ERISA Preemption

Although the issue of NLRA preemption is not before the Court, the fact that the E&C JATC is the result of collective bargaining is an important consideration in an ERISA preemption analysis. In *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. at 526, the Court ruled that ERISA preempted a New Jersey statute limiting the offset of pension benefits on account of workers' compensation awards. In reaching this conclusion, one "consideration" was the collectively-bargained nature of the pension plan at issue:

Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate pension terms. [citations.] As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring pre-emption of intrusive state law.

451 U.S. at 525-26 (citations and footnotes omitted).

The same is true of the E&C JATC. It is undisputed that the E&C JATC resulted from collective bargaining between a multiemployer bargaining group and the National Electronic Systems Technicians Union (NESTU).

F. California Labor Code Section 1777.5 Relates To Employee Welfare Benefit Plans Because It Differentiates Between State-Approved and Non-Approved ERISA Plans

The Tenth Circuit, in *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir. 1992), and the Ninth Circuit in this case utilized a different, but complimentary, analysis in concluding that state prevailing wage laws, when applied to apprentices, "relate to" an employee welfare benefit plan. In *Calhoon*, the State of Oklahoma took the position that helpers participating in the National Elevator Industry Education Program (NEIEP) had to be paid at the higher mechanic's wage rate because the NEIEP was not approved by the Federal

Bureau of Apprenticeship Training (BAT).³ In ruling that the Oklahoma prevailing wage law relates to an employee welfare benefit plan, the Tenth Circuit reasoned that a state law may not, consistent with ERISA, favor one type of ERISA plan over other ERISA plans:

We accept, as a general proposition, the state's right to regulate wages. But a wage law that provides an option favoring certain ERISA plans and benefits (BAT approved plans) over other ERISA plans and benefits (NEIEP) is not a law of "general application" and may be used to effect change in the administration, structure and benefits of an ERISA plan. If a state is permitted to use a prevailing wage scheme to single out and favor certain ERISA plans over other ERISA plans, the potential for abuse is great – a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans.

957 F.2d at 1561. In this case, the Ninth Circuit adopted the reasoning of the Tenth Circuit in concluding that application of California's prevailing wage statute relates to an ERISA plan. Pet. App. 13-15.

The "relate to" analysis employed by the Ninth and Tenth Circuits is consistent with, if not required by, one of the central tenets of ERISA. As explained previously, ERISA does not regulate the substantive content of employee welfare benefit plans; the level of benefits provided by ERISA plans is left to the control of private

³ Oklahoma apparently does not have a State Apprenticeship Agency or State Apprenticeship Council approved by BAT pursuant to 29 C.F.R. § 29.12.

parties. *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. at 511. If states were permitted to grant certain benefits to state-approved apprenticeship plans and to deny the same benefits to non-approved plans, states would be able to affect the substantive content of benefit plans, thereby depriving private parties of a right guaranteed by ERISA.

G. Application Of ERISA's Preemption Clause Is Necessary To Prevent Conflicting And Inconsistent State And Local Regulation Of Apprenticeship Plans

Any state law which risks subjecting ERISA plans to conflicting state regulations satisfies the "relate to" test of ERISA's preemption clause. *FMC Corp. v. Holliday*, 498 U.S. at 59. When state prevailing wage laws such as Labor Code section 1777.5 are applied to apprentices, there is a strong likelihood that ERISA apprenticeship programs will be subjected to conflicting state regulation.

As noted previously (Section I.C above), many apprenticeship programs operate on a multi-state basis. If state prevailing wage laws such as section 1777.5 may be applied against apprentices without limitation, employers participating in multi-state apprenticeship programs will be required to pay different wages and benefits to apprentices, depending on the state where the work is being performed. This would create chaos for apprenticeship programs operating in more than one state.

For employers like Sound Systems which participate in a regional, single state apprenticeship program, the risk of inconsistent state regulation is less likely but still possible. If Sound Systems were to successfully bid on a

project in Oregon or Nevada, it would presumably use its regular employees, some of whom are participants in the E&C JATC. Permitting Oregon or Nevada to apply its own prevailing wage law to apprentices participating in the E&C JATC would pose the same risk of conflicting state regulation.

H. *Travelers* Does Not Assist Petitioners

Although the text of ERISA's preemption provision is unhelpful, that does not mean that every ERISA preemption issue requires the same detailed analysis which this Court undertook in *Travelers*. As explained above, if a state law specifically refers to ERISA plans, is specifically designed to affect ERISA plans, or directly affects the benefits provided by ERISA plans, the inquiry ends there. For this reason alone, *Travelers* does not control this case.

Beyond that, the surcharge statute at issue in *Travelers* had, at most, an indirect influence on ERISA plans. It affected the cost of providing medical insurance, but rate variations were a normal feature of the health care industry before and after ERISA. *Travelers*, 115 S. Ct. at 1679. However, the surcharges did not interfere with a plan's uniform administrative practices or the provision of a uniform interstate package. *Id.*

In contrast, a state prevailing wage statute has a direct and immediate impact on an apprenticeship program and its employee participants. On state-funded public works projects, it can force employers to pay apprentices more than the wage rates set forth in the

apprenticeship standards, which in this case were established through collective bargaining.

Unlike in *Travelers*, a state prevailing wage law does interfere with the uniform administration of an ERISA plan. On private construction jobs employers are able to pay apprentices in accordance with the apprenticeship standards, but on state public works projects employers can be required to pay different, higher wage rates. This potential for disrupting apprenticeship programs undermines Congress's intent "to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern.'" *Travelers*, 115 S. Ct. at 1677 (quoting *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. at 523).

For these reasons, Petitioners' reliance on *Travelers* was squarely rejected by the Ninth Circuit in *ABC National Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343 (9th Cir. 1995), one of several ERISA preemption cases involving apprenticeship issues decided by the Ninth Circuit after this case. Confronting precisely the same argument which Petitioners advance here, the Ninth Circuit explained that:

Appellees argue that the California statutes here have only an indirect economic effect, like the statute in *Blue Cross*. Unlike the ability to pay into certain apprenticeship funds, however, rate variations among hospital providers are unremarkable, accepted examples of cost variation. *Id.* Charge differentials for commercial providers varied dramatically prior to state regulations, "presumably reflecting the geographically disparate burdens of providing for the uninsured." *Id.* (citations omitted). In contrast, given the competitive nature of the bid process for

public works contracts, contractors cannot opt to pay prevailing wages to trainees or apprentices in unapproved programs. They must find a state approved program or forego using apprentices, and they must either pay into state approved programs or undertake a complicated set-off procedure to equalize the payment. The market for apprentice programs simply does not equate with the market for health care providers.

68 F.3d at 347; see also *Inland Empire Chapter, AGC v. Dear*, 77 F.3d 296, 299-300 (9th Cir. 1996) (rejecting the State of Washington's argument that the Ninth Circuit's decision in this case was inconsistent with *Travelers*).

I. The Extent To Which States Have Traditionally Regulated Apprenticeship Is Irrelevant To The Preemption Analysis In This Case

Travelers does not require a court to undertake an extensive analysis of a state's regulatory interest in each and every ERISA preemption case. To escape preemption, a state law must operate in an area of traditional state regulation and affect an ERISA plan in a tenuous, remote or peripheral way. *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), aff'd mem., 477 U.S. 901 (1986). However, if Congressional intent is clear, "that is the end of the matter" and no further inquiry is necessary. *FMC Corp. v. Holliday*, 498 U.S. at 57. As the Ninth Circuit stated in response to virtually the same argument, "[a] purported fundamental state interest is relevant only when there is an element of uncertainty as to whether the challenged state law falls within the scope of the ERISA preemption clause." *Local Union 598 v. J.A. Jones*

Constr. Co., 846 F.2d 1213, 1220 (9th Cir. 1988), *aff'd*, 488 U.S. 881 (1988).

In this case, there is no uncertainty as to whether a state prevailing wage law, when applied to apprentices, relates to an ERISA apprenticeship plan. That some states may have regulated apprenticeship prior to ERISA is therefore irrelevant. *See Boise Cascade Corp. v. Peterson*, 939 F.2d at 637-38 (rejecting the argument that a minimum apprentice to journeyman ratio is valid as an exercise of traditional state regulation over occupational training); *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th at 445 n.18 (Labor Code § 1777.5 does not affect apprenticeship plans in a "tenuous, remote or peripheral way" because it mandates that apprenticeship plans adhere to specific terms and conditions in order to receive state and federal benefits).

III. APPLICATION OF THE STATE PREVAILING WAGE LAW TO APPRENTICES IS NOT SAVED BY ERISA'S SAVINGS CLAUSE

A. ERISA's Savings Clause Is Narrowly Construed

Unlike the general preemption clause, which has consistently been given an expansive interpretation, ERISA's savings clause, 29 U.S.C. § 1144(d), has been narrowly construed. In *Shaw*, this Court explained that ERISA's structure and legislative history caution against applying the savings clause too expansively. 463 U.S. at 104. Since Congress applied the principle of preemption "in its broadest sense" and created very limited exceptions to

preemption, this Court refused to treat ERISA § 514(d) as a general savings clause. *Id.*

In *Shaw*, it was argued that New York's entire Human Rights Law was preempted by ERISA. The Court refused to take ERISA preemption that far because many state anti-discrimination laws prohibit the same practices which are prohibited by Title VII. Furthermore, Title VII requires aggrieved employees to utilize available state remedies. In both ways, New York's Human Rights Law provided "a means of enforcing Title VII's commands" and to that extent was saved from preemption by the savings clause. 463 U.S. at 101-102.

However, the New York Human Rights Law also prohibited certain practices which at that time were lawful under Title VII. Specifically, the New York statute required employers to treat pregnancy the same as other nonoccupational disabilities, something which Title VII did not require until years later. To the extent that the New York statute prohibited conduct and practices which were permitted by federal law, the state law was not saved from preemption. 463 U.S. at 103-104.

It is against this framework that the Fitzgerald Act and its implementing regulations must be judged.

B. The Fitzgerald Act And The Implementing Regulations Establish A Voluntary System Designed To Encourage Apprenticeship

Unlike Title VII, which makes various employment practices unlawful, the Fitzgerald Act and its implementing regulations establish a voluntary, nonmandatory system of promoting apprenticeship. As the Tenth Circuit

explained in *National Elevator Industry v. Calhoon*, the Fitzgerald Act "merely seeks to facilitate the development of apprenticeship programs." 957 F.2d at 1562.

Neither the Fitzgerald Act nor the implementing regulations require employers to employ apprentices. Similarly, federal law does not require employers to establish an apprenticeship program. *Associated Builders and Contractors v. Perry*, 817 F. Supp. 49, 53 (E.D. Mich. 1992).

If an employer or employer group chooses to establish an apprenticeship program, there is no requirement that the program register with a state or the federal government. *Associated Builders and Contractors v. Perry*, 817 F. Supp. at 53. Nor is there any requirement that an apprenticeship program obtain state or federal approval. Employers who establish an apprenticeship program without adhering to the apprenticeship standards promulgated by the Secretary of Labor do not violate federal law. *Southern California Chapter, ABC v. Aubry*, 4 Cal. 4th at 452; *Associated Builders and Contractors v. Perry*, 817 F. Supp. at 53. Although the Fitzgerald Act encourages employers to follow federal standards, it does not discourage other non-approved programs which choose to ignore the federal standards. *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1562. In short, whether to establish an apprenticeship program and how to run it are completely voluntary decisions.

Instead of relying on directives and commands, the regulations implementing the Fitzgerald Act, 29 C.F.R. § 29.1 *et seq.*, rely on various incentives to encourage compliance with the federal apprenticeship standards. Most importantly, employers who do not participate in an

apprenticeship program complying with *federal* apprenticeship standards (29 C.F.R. § 29.5) are not eligible to employ apprentices at apprentice wage rates on federally-funded Davis-Bacon projects.

An apprenticeship program may be approved as complying with federal apprenticeship standards in one of two ways. The apprenticeship program may apply for approval directly to the Bureau of Apprenticeship Training (BAT), or it may apply to a recognized State Apprenticeship Agency or State Apprenticeship Council in those states where BAT has approved a state agency for that purpose. 29 C.F.R. § 29.2(l).

When an apprenticeship program is approved by BAT or a State Apprenticeship Council, approval is for *federal purposes only*. The Fitzgerald Act's implementing regulations repeatedly state that apprenticeship programs are approved for *federal purposes*. See, e.g., 29 C.F.R. § 29.2(k), (l), (o); 29 C.F.R. § 29.3(a); 29 C.F.R. § 29.7(b)(9); 29 C.F.R. § 29.12(a), (e)(1) and (2); 29 C.F.R. § 29.13(b)(4), (d), (e), (f). Thus, the Secretary of Labor has authorized State Apprenticeship Councils to approve apprenticeship programs for *federal purposes*, but there is no indication in the Fitzgerald Act or the implementing regulations that State Apprenticeship Councils are authorized to approve apprenticeship programs for *state purposes*. As will be explained below, this is the key aspect of the Fitzgerald Act's implementing regulations for purposes of applying ERISA's savings clause.

C. California's Prevailing Wage Law Is Not A Means Of Enforcing The Fitzgerald Act

California's prevailing wage statute possesses none of the characteristics which saved most of New York's Human Rights Law from preemption in *Shaw*. Given the voluntary, non-mandatory nature of the Fitzgerald Act and its implementing regulations, state law does not provide a means of enforcing federal law. As the Tenth Circuit observed, "there is nothing in [the Fitzgerald Act] to enforce." *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1562. See also *Hydrostorage*, 891 F.2d at 731 (Lab. Code § 1777.5 "clearly is not an enforcement mechanism of federal law"); Pet. App. 17-18 (same); *Associated Builders and Contractors v. Perry*, 817 F. Supp. at 53.

Stated differently, the Fitzgerald Act is nothing more than a statement of policy and good intentions. Unlike Title VII, it does not prohibit any conduct and therefore there are no commands in the Fitzgerald Act capable of being enforced. Unlike Title VII's enforcement scheme, employees are never required to resort to state law in order to enforce rights granted by the Fitzgerald Act.

In *Shaw*, the Court emphasized that Title VII expressly preserves non-conflicting state laws. 463 U.S. at 101. Neither the Fitzgerald Act nor its implementing regulations contain a comparable provision, and this is an additional factor favoring preemption. *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1562; *Associated Builders and Contractors v. Perry*, 817 F. Supp. at 51; Pet. App. 17.

Shaw teaches that a state law which prohibits conduct permitted by federal law is not saved by ERISA's savings clause. 463 U.S. at 103. By the same reasoning, when a state prohibits the employment of non-approved apprentices on a state public works project, ERISA's savings clause does not apply because federal law is silent with regard to the employment of apprentices on state-funded public works projects.

D. If ERISA's Savings Clause Has Any Application to the Fitzgerald Act, It Is Limited To State Approval Of Apprenticeship Programs Solely For Federal Purposes

ERISA's savings clause operates to save any "rule or regulation" as well as any law of the United States. 29 U.S.C. § 1144(d). Thus, it is possible that the savings clause has some application to the regulations adopted by the Secretary of Labor pursuant to the Fitzgerald Act, even though it does not save the Fitzgerald Act itself.

Recognizing that possibility, Respondents suggest that the farthest possible reach of the savings clause is to preserve a state's ability to approve an apprenticeship program *for federal purposes*. Regardless whether an apprenticeship program is approved by BAT or a recognized State Apprenticeship Council, the Fitzgerald Act regulations merely state that such approval is effective "for federal purposes." See, e.g., 29 C.F.R. § 29.2(l) and (o). However, there is nothing in the Fitzgerald Act regulations to indicate that states have been authorized to approve apprenticeship programs for non-federal purposes, i.e., state purposes.

Under this interpretation of the savings clause, it would preserve a state's ability to approve apprenticeship programs for federal purposes, such as the Davis-Bacon Act, 40 U.S.C. § 276a. Thus, apprentices who are participating in an apprenticeship program which has not been approved by the BAT or a recognized State Apprenticeship Council would not be eligible to work on federally-funded public works projects at apprentice wage rates.

Conversely, ERISA would still preempt a state's ability to approve apprenticeship programs solely for *state purposes*. Where, as here, a state's approval of an apprenticeship program relates solely to the eligibility of apprentices to work on a *state-funded* public works project, the state's application of its prevailing wage law is not saved by ERISA § 514(d).

The California Supreme Court's decision in *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th 422 (1992) is not to the contrary. The Court refused to distinguish between approval for federal purposes and approval for state purposes because the plaintiffs were seeking to obtain approval of their apprenticeship program for both federal *and* state purposes. 4 Cal. 4th at 450 n.20. In this case, Respondents are not asking the Court to invalidate the authority of a State Apprenticeship Council to approve apprenticeship programs for federal purposes.

The position advocated by the Associated General Contractors amici goes too far. It would permit a state to exercise its approval function for both federal *and* state purposes, even though the Fitzgerald Act regulations

only authorize a State Apprenticeship Council to approve an apprenticeship program for federal purposes.

The Second Circuit's analysis of ERISA's savings clause in *JATC, Local 363 v. New York State Dept. of Labor*, 984 F.2d 589 (2d Cir. 1993) suffers from a similar flaw. The Second Circuit mistakenly believed that the Fitzgerald Act regulations give a BAT-approved State Apprenticeship Council the authority to deregister an apprenticeship program for nonconformity with federal or state law or federal or state standards. 984 F.2d at 592, 594. This is a misreading of the Fitzgerald Act regulations. They authorize an approved State Apprenticeship Council to "derecognize" an apprenticeship program for federal purposes only, and only for failing to comply with the federal apprenticeship standards set forth in the regulations promulgated by the Secretary of Labor. See 29 C.F.R. § 29.13. Nowhere do the Fitzgerald Act regulations permit a state to derecognize an apprenticeship program for failing to comply with state law or state standards, let alone for state purposes.

The bankruptcy case relied upon by Petitioners and the United States, *In Re Schein*, 8 F.3d 745 (11th Cir. 1993), is easily explained. The Bankruptcy Code expressly authorizes "opt out" states to determine the types and amounts of property which a debtor may retain in order to gain a "fresh start." 11 U.S.C. § 522(b). The Third Circuit in *Schein*, like the Fifth and Eighth Circuits before it, concluded that ERISA's savings clause operates to save the bankruptcy exemptions enacted by opt-out states pursuant to the authority of 11 U.S.C. § 522(b). 8 F.3d at 750-754.

The difference between *Schein* and this case is that the Bankruptcy Code expressly delegates to the states the right to determine what exemptions may be claimed by a debtor in possession. Federal law would therefore be impaired if debtors could not claim the exemptions which Congress authorized the states to define. See *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th at 451 n.22 (Bankruptcy Code exemptions are not comparable to the Fitzgerald Act in applying ERISA's savings clause). Here, in contrast, the Fitzgerald Act regulations do not authorize a state to create its own apprenticeship standards; they merely authorize a State Apprenticeship Council to apply federal apprenticeship standards solely for federal purposes.

CONCLUSION

The judgment of the court of appeals should be affirmed. If for any reason Respondents do not prevail on the issue of ERISA preemption, the case should be remanded to the Ninth Circuit with instructions to consider the issue of NLRA preemption.

Dated: August 1, 1996

Respectfully submitted,

RICHARD N. HILL

LITTLER, MENDELSON, FASTIFF,

TICHY & MATHIASON

650 California Street, 20th Floor

San Francisco, CA 94108-2693

Counsel for Respondents

Dillingham Construction, N.A., Inc.

and Manuel J. Arceo,

dba Sound Systems Media

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No. 95-789

Supreme Court, U.S.
FILE

SEP 3 1996

In The
Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS
ENFORCEMENT, DIVISION OF APPRENTICESHIP
STANDARDS, DEPARTMENT OF INDUSTRIAL
RELATIONS, COUNTY OF SONOMA,

v.

Petitioners,

DILLINGHAM CONSTRUCTION, N.A., INC., MANUEL J.
ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

REPLY BRIEF

JOHN M. REA,
Chief Counsel
(Counsel of Record)
VANESSA L. HOLTON,
Asst. Chief Counsel
FRED D. LONSDALE,
Sr. Counsel
JAMES D. FISHER, Counsel
SARAH COHEN, Counsel
State of California
Department of Industrial
Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 972-8900
*Counsel for State Petitioners
Department of Industrial
Relations Division of
Apprenticeship Standards*

H. THOMAS CADELL, JR.,
Chief Counsel
RAMON YUEN-GARCIA,
Counsel
State of California
Division of Labor
Standards Enforcement
45 Fremont Street
Suite 3220
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 975-2060
*Counsel for State Petitioners
Division of Labor Standards
Enforcement and County of
Sonoma*

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I. Introduction

Dillingham and its *Amici* discuss issues surrounding potential state regulation of apprenticeship as if review had not been granted on a specific question. The issue in this case is a narrow one. The sole question is whether ERISA preempts California's restriction of its lower apprentice wage on state-funded public works to workers who are registered in apprenticeship programs that have been approved as meeting federal standards.

Dillingham does not address the practical results of preemption, such as the creation of an inconsistency between state and Davis-Bacon definitions of "apprentice." Nor does Dillingham address the historical background of apprenticeship which Congress would have considered when it passed ERISA. These are factors which *New York State Conference of Blue Cross and Blue Shield, et al. v. Travelers*, 115 S. Ct. 1671 (1995) commends in determining congressional intent. These factors are just as important for understanding the purpose of the savings clause as for determining the threshold issue of whether California's law relates to ERISA plans. Dillingham, instead, remains focused almost entirely on the unhelpful text of ERISA. As is shown below, this narrow focus cannot bring into balance the various state and federal interests which intersect in the issue before the Court.

II. The Fitzgerald Act Would Be Severely Impaired By Preemption Of California's Law.

The question before the Court can be decided solely on the basis of the ERISA savings clause. Even if California's law did relate to an ERISA plan within the meaning of *Travelers*, it will not be preempted where doing so would impair or modify another federal law, the Fitzgerald Act. Because of the effects of *Dillingham* on the states' collective abilities to further federal interests in apprenticeship, ERISA's savings clause is a straightforward basis for preserving this application of California's prevailing wage law.

Dillingham's reading of the savings clause is very narrow and only repeats, without analysis, the Ninth Circuit language about *Shaw v. Delta Airlines*, 463 U.S. 85 (1983). Dillingham does not respond to any of the argument about the practical effects of preemption on, for example, the availability or quality of apprentices for future federal public works, the use of apprenticeship for social or other goals in other federal non-construction programs, or the federal-state partnership set out in the Fitzgerald Act and the Secretary's regulations. Dillingham apparently concedes that there would be a massive workload shift from the state to the federal Bureau of Apprenticeship and Training ("BAT"). Dillingham nowhere disputes that program quality would suffer as a result of pressure from the existence of plans which would not need to include an educational component or supervised on-the-job training, but would only need to be ERISA-covered.

Dillingham's dismissal of the savings clause ignores the language of ERISA which saves laws where preemption would impair or modify other federal laws or regulations. While it is true that the Fitzgerald Act does not have an enforcement mechanism and does not prohibit anything, neither of these facts means that the Act will not be impaired by the preemption of state law, where the state law is integral to the congressional scheme and purpose set out in the Fitzgerald Act itself.

Dillingham's argument rests on the assumption that "the Fitzgerald Act is nothing more than a statement of policy and good intentions." Brief of Dillingham at 42. This formulation ignores both the text of the Act and almost 40 years of the history of apprenticeship under that Act. The Fitzgerald Act specifically directs the Secretary of Labor to "formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices." The Act directs the Secretary to "extend" application of such standards, to "encourage" their inclusion in contracts of apprenticeship and to "cooperate" with states in formulating and promoting standards of apprenticeship. 29 U.S.C. § 50 (1994). *Dillingham* will discourage the inclusion of standards in apprenticeship agreements, will result in a contraction of the application of such standards and will, in all likelihood, severely diminish any state cooperation with the federal effort to promote apprenticeship. If this does not "alter" or "invalidate" the Fitzgerald Act, it surely "modifies" or "impairs" it.

The Secretary's regulations are also impaired if California's law remains preempted. Dillingham makes the

fanciful assertion that the Secretary of Labor's regulations contemplate approval for federal purposes only, and that approval is not authorized for state purposes.¹ Brief of Dillingham at 43. Again, the text of the regulations and the history of apprenticeship practice before and after passage of the Fitzgerald Act make clear that this is a completely unfounded reading of these regulations. The regulations have two stated purposes. One is to "set forth labor standards to safeguard the welfare of apprentices." Another is to extend those standards by formally giving states the ability to approve apprenticeship programs for federal work as well, if the state adopts acceptable apprenticeship procedures and laws. 29 C.F.R. § 29.1 (1995), Pet. App. 64.

Dillingham's reading of these regulations as only concerning federal purposes turns the historical development of apprenticeship on its head. Historically, approval of apprenticeship programs began with state approval for state purposes. The Fitzgerald Act then incorporated what the states had begun. The 1977 regulations extended and formalized a working relationship that had existed under the Fitzgerald Act since 1937. With the 1977 regulations, in states with acceptable laws and standards meeting federal regulations, the federal BAT agreed to continue its administrative practice of accepting state approval as valid for federal purposes as well. That the regulations assume the states' authority appears in 29

¹ This is especially illogical where, as in this case, the state purpose is exactly the same as the federal purpose – to determine which apprentices may be paid the lower apprentice wage on government-funded construction.

C.F.R. § 29.12(c) (1995), Pet. App. 87, which allows "currently recognized" agencies to formalize "continued recognition." This makes sense only if state agencies were already in existence and approving programs for state purposes.² If, as Dillingham suggests, the states were to be shut off from any state use of the approval process, why would any state agree to accept the Secretary of Labor's invitation to devote resources to a purely federal responsibility? Under Dillingham's logic, the California Apprenticeship Council, once approved by the Secretary under those regulations, would have been able to offer only federal approvals after four decades of doing both state and federal. This is a very unlikely and ahistorical reading of these regulations.

The terms of ERISA's savings clause indicate an intent to save from preemption federal laws which relate to employee benefit plans. This comports with Congress' goal of federalizing regulation of employee benefit plans, thus eliminating conflicting state and local regulation while at the same time protecting the interests of workers in actually receiving the benefits promised to them. Dillingham's argument that only laws which rely on directives and commands are saved is not required by the text and is quite inconsistent with the purpose of the savings clause. In the area of pension benefits Congress provided substantive regulation. In the area of employee welfare benefits Congress did not, and so the savings clause was

² California's Apprenticeship Council was created in 1939, 1939 Cal. Stat. 220 (current version at CAL. LAB. CODE § 3070 (West 1989)), and approved under the 1977 regulations. J.A. 37, Decl. Jesswein, ¶ 3.

an important tool to protect those federal laws concerning welfare plans which did exist. Congress did not intend to lessen the protections for workers when it passed ERISA. It is hard to imagine a law more appropriately saved than the Fitzgerald Act. At the time of passage, the federal government and the states had worked together for almost 40 years to expand the standards of apprenticeship and to protect the welfare of the apprentice. This is the very sort of law Congress must have had in mind in enacting a savings clause.

III. "Apprenticeship Program" Is Not A Synonym For ERISA Plan.

Dillingham responds to California's argument that Congress never intended to preempt California's ability to restrict its apprentice wage to registered apprentices by asserting that this Court need not consider questions of congressional intent or the purpose of ERISA because, Dillingham claims, the California law "refers" to employee benefit plans in its text. The text says only that it is "apprentices . . . in training under apprenticeship standards and written apprentice agreements . . ." who may be paid a lower apprentice wage. CAL. LAB. CODE § 1777.5 (West Supp. 1996), Pet. App. 58. Thus, Dillingham must show that all apprenticeship programs are covered by ERISA. While many programs which have been involved in prior litigation in fact may have been covered by ERISA, it is simply not the case that apprenticeship program and ERISA plan are synonymous.

Dillingham supports its assertion that all apprenticeship programs are ERISA plans by pointing to a number

of cases, including this one, where the programs were multi-employer funded plans to provide apprenticeship. See, e.g., *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir. 1992), cert. denied, 506 U.S. 953 (1992) (receives regular contributions); *Hydrostorage v. Northern Cal. Boilermakers*, 891 F.2d 719 (9th Cir. 1989), cert. denied, 498 U.S. 822 (1990). California does not dispute that some programs are ERISA-covered. In *Hydrostorage*, however, the court said only that the apprenticeship standards and trust fund were both covered. *Id.* at 728 (standards are an integral part of a larger "program"). Other cases cited by Dillingham are even less helpful. *Keystone Chapter, ABC v. Foley*, 37 F.3d 945 (3d Cir. 1994), cert. denied, 115 S. Ct. 1393 (1995), for example, does not discuss the issue of coverage, but only cites to ERISA's definition of an employee welfare benefit plan. *Id.* at 954. No case has held that *all* arrangements to provide apprenticeship are covered under ERISA.

The most knowledgeable authority to have considered the specific question of whether every plan is covered by ERISA, the United States Department of Labor ("DOL"), has concluded that not all training and apprenticeship plans are covered by ERISA.³ The Secretary's opinion is entitled to great weight, as are the regulations issued by the Secretary concerning the scope of ERISA coverage. *Massachusetts v. Morash*, 490 U.S. 107, 116

³ The Department of Labor opinion letters cited by Dillingham are not to the contrary. Both involved trustee plans. Also, there are other opinion letters besides the two cited by Dillingham which do make the distinction between funded and unfunded plans. See, e.g., ERISA Advisory Opinion No. 94-14A (April 29, 1994).

(1989). Extending ERISA to claims for various unfunded benefits would greatly expand the jurisdiction of the federal courts into areas of traditional state regulation, an extension unsupported by Congress' primary concerns in enacting ERISA. *Id.* at 118-119. Dillingham's rejection of the Secretary's position would mean that every time an employer plans a training on how to use a new power tool or computer system, an ERISA training or apprenticeship plan has been created. Is federal court the proper venue for employees who feel they have not been trained on how to use Windows 95 properly?⁴ Any private employer who hired an unskilled worker and who planned to train that worker would find, under Dillingham's argument, that the employment relationship for the period of training was covered by ERISA and had been federalized.

One problem with Dillingham's textual argument is that it does not account for part of ERISA's text. ERISA contemplates that there will be both a "plan, fund, or program" and a benefit provided by that plan, fund, or program. Thus, coverage occurs when there is both an apprenticeship program and a "plan, fund, or program" to provide that apprenticeship to employees or union members. As this Court noted in *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987), and as Dillingham concedes in its Brief at 12, a benefit is not the same as a plan to provide the benefit. This remains true even where the benefit is a program. The Court does not need to reach

⁴ See Brief of *Amicus Curiae* ABC Golden Gate at 18, n. 20 (suggesting that apprentice disputes could all be heard in federal court under 29 U.S.C. § 1132 (1994)).

the questions raised by *Amicus Curiae* AFL-CIO to see that an apprenticeship program, as a matter of ERISA's text, is not the same as a plan to provide it. A text-based argument which does not account for all of the text does not compel a court to turn its eyes from the statutory purpose, and decades of federal practice, when the court determines the meaning of a statute.

Dillingham asserts that its broad reading of the term "apprenticeship program" is supported by the definition in the Fitzgerald Act regulations. These regulations define "apprenticeship program" broadly, but they also define "apprentice" as someone in an *approved program*. If we assume that ERISA intended to rely on Fitzgerald Act definitions, the result would be that the only ERISA-covered apprenticeship programs would be those that are approved by BAT or a BAT-approved state apprenticeship council because the only apprentices are those in approved programs. An argument can also be constructed from the text of the Fitzgerald Act regulations that if the regulations define apprentice for *all* "federal purposes," those purposes would include ERISA, another federal statute.⁵ A purely textual reading of the regulation is, however, not appropriate given the history and purpose of the regulations.⁶

⁵ The regulation includes as federal purposes any "benefit" or "right" pertaining to apprenticeship. 29 C.F.R. § 29.2(k) (1995), *Pet. App.* 66.

⁶ The examples of "federal purposes" given in the comments to rulemaking were the Davis-Bacon Act and the Service Contract Act. 42 Fed. Reg. 10,138-10,139 (1977), *Pet. App.* 99. There is no evidence of whether the Department of Labor takes the position that the Fitzgerald Act regulations were intended to define apprentice for purposes such as ERISA.

Even if, for the sake of argument, one assumes that California's use of "apprentice" or "apprenticeship program" was per se a mention of an employee benefit plan, this mention is not the sort of "reference" to an employee benefit plan that triggers preemption under *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992). In that case, the District required employers to provide health benefits for eligible employees which were measured by reference to the employer's "existing health insurance coverage."⁷ This Court found that setting benefits by reference to an ERISA plan was preempted. Nothing like that is involved here. Wages are set by reference to the Director's prevailing wage determinations. See CAL. CODE REGS. tit. 8, § 230.1 (1995).⁸ The Director reviews and statistically tests multiple sources of wage data. CAL. LAB. CODE §§ 1773-1773.8 (West 1989 and Supp. 1996). The determinations set out what wage is prevailing for each classification of worker in the location of the public work independent of – and ignorant of – the ERISA status of any apprenticeship plan. This is not the type of "reference" contemplated by *Greater Washington*.

⁷ The District conceded that the statutory benefits were "set by reference to covered employee welfare benefit plans." *Greater Washington*, 506 U.S. at 128.

⁸ *Amicus Curiae ABC Golden Gate* is incorrect in stating, in its brief at 9, n.14, that California requires all programs to follow union rates. All programs, joint and unilateral, are required to follow the Director's prevailing wage. Among other factual errors, ABC Golden Gate is also wrong to assert that federal rules allow a program to set its own wages on public works. See 29 C.F.R. § 5.5(a)(4) (1995) (apprentices are paid the rate expressed as a percentage of the journey rate in the wage determination, not in the standards).

California's law did not intend to refer to ERISA plans nor is it premised on the existence of ERISA plans. Contrast *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). California had restricted its apprentice wage to "registered apprentices" for almost 40 years prior to the passage of ERISA. Although it has been said that many national trends begin in California, it would be impossible for the state to have intended to refer to ERISA plans almost 40 years before Congress created the concept of an ERISA plan.

Dillingham also asserts that California's wage law is "presumptively preempted" because the law mandates benefits to be provided by an ERISA plan. In an effort to show that California's law mandates benefits, Dillingham first relies on provisions from the text of California Labor Code section 1777.5 which have been modified by court decisions and regulation, and thus are no longer enforced as written. Brief of Dillingham at 26-27. For example, Dillingham suggests that the employment of apprentices on public works must be in accordance with the apprenticeship standards. California has modified its regulations to eliminate this requirement. As to the enforcement of other terms in section 1777.5, see California's Opening Brief at 12, n.5.

Dillingham then asserts that the wage law necessarily mandates a benefit because wages are a part of an apprenticeship program. This argument moves well beyond the reasoning of the Ninth Circuit,⁹ which held

⁹ It also goes beyond the reasoning of the Tenth Circuit. See *National Elevator Industry, Inc. v. Calhoun*, 957 F.2d 1555 (10th Cir.

only that California could not deny its lower apprentice wage to a worker in a program based on whether that program was approved. Dillingham now asserts that the wage itself is a term of the ERISA plan, and so the state may not enforce any prevailing wage for apprentices. Instead, the state must defer to the program and any wage set by the program.

Dillingham's new position has a number of flaws: Wages are not an employee benefit under ERISA or any other labor law. Wages are paid by an employer, not by an apprenticeship program. A similar attempt to preempt a state wage and hour law by calling wages an employee benefit failed before this Court in *Morash*. Because ERISA lacks any substantive requirements for apprenticeship plans, ERISA does not require that an apprenticeship plan cover wages. Approval under the Fitzgerald Act does require a program to include a progressive schedule of wages, 29 C.F.R. § 29.5(b)(5) (1995), Pet. App. 73, but in doing so defers to the state to set those wages:

The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, *unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement.*

Id. (emphasis added).

1992), *cert. denied*, 506 U.S. 953 (1992). There the state restricted the apprentice/trainee wage to workers in approved programs. There was no suggestion that the employer could choose whatever rate the employer wished for trainees in the ERISA program, only that the state could not limit the apprentice/trainee wage to workers in approved programs.

The practical effect of Dillingham's new position would be that an employer with an ERISA-covered "training plan" could unilaterally incorporate wages and hours into a training plan and then fix wages below state minimums and mandate hours in excess of state maximums, and thereby circumvent state minimum labor standards.¹⁰ Dillingham's only justification for tossing aside this most traditional area of state regulation is the assertion that wages are "essential terms and conditions of an apprenticeship program." Brief of Dillingham at 29.

While a program must include a progressive schedule of wages conforming with 29 C.F.R. § 29.5(b)(5) (1995), in order to meet federal standards, nothing implies that those wages can fall below state minimums. Read in the context of the preceding regulation concerning ongoing instruction, § 29.5(b)(4), and subsequent regulations concerning periodic review and evaluation, § 29.5(b)(6), and credit for prior experience, § 29.5(b)(12), it is clear that the purpose of the regulation is to ensure that wages increase as skill is acquired, not to allow the

¹⁰ If Dillingham's position concerning wages is accepted, nothing would prevent some employer from arguing that ERISA would preempt state regulation of other terms usually found in an apprenticeship program. Because approved apprenticeship programs include "safety training," 29 C.F.R. § 29.5(b)(9) (1995), Pet. App. 73, a program could create its own rules about exposure to toxic chemicals or radiation, or working in high places without protection. Dillingham's position has no stopping point. All state regulation of "working conditions," would, under Dillingham's position, be preempted where an employer has made each condition a term of an ERISA apprenticeship or trainee program.

opportunity for creating sub-minimum wages. For examples of the broad range of programs that can arguably be ERISA training plans, and under Dillingham's doctrine would be a plan whose terms would trump state minimum wage laws, see the Brief of *Amicus Curiae ABC Golden Gate* at 3 (training in math improvement and English as a second language as ERISA-covered training or apprenticeship).

Allowing a program to set wages for apprentices is inconsistent with the constitutional and administrative rejection of the uncertainty entailed in a *post hoc* examination of whether the contractor had paid the correct prevailing wage rate. As discussed in California's Opening Brief at 10-11, the bid process for construction projects subject to prevailing wage requirements depends on a prior determination of the wage rate for each classification of worker. A prior determination puts all bidders on an equal labor cost footing, and eliminates the possibility that a contractor will learn only after building a project that the wages paid were too low. *Amicus Curiae ABC Golden Gate* recognizes the need for some definition of apprentice beyond one made up at the job site by a contractor when starting a public works job. Brief of *Amicus Curiae ABC Golden Gate* at 18, n.20. Their proposed definition would presumably be applied when a question arises during the course of a job as to who is an apprentice. However, wage rates and labor costs cannot be determined in advance if some after-the-fact judicial process is needed to assess whether the contractor was entitled to pay the apprentice wage based on whether the contractor's plan was really an apprenticeship plan and really covered by ERISA. In contrast to ABC Golden

Gate's proposal, the states' common use of the Davis-Bacon definition of apprentice – one already registered in an approved program – allows contractors to bid with certainty about which workers can be paid an apprentice wage, and avoids the need for government imposition of penalties and back wages on its public works jobs.

In addition to the many practical problems outlined above, existing ERISA preemption doctrine is incompatible with Dillingham's position. If a state were to modify its prevailing wage law to conform to *Dillingham* by saying that all workers on jobs funded with state money shall be paid the journey-level prevailing wage *except* those workers (apprentices or trainees) who are covered in ERISA plans, such a state law would single out ERISA plans in the precise way found preempted in *Mackey v. Lanier Collection Agency and Services, Inc.*, 486 U.S. 825 (1988). Likewise, if Dillingham's argument that a state prevailing wage law is automatically preempted if it mentions the term "apprentice" is followed to its conclusion the result is equally absurd: there could be no apprentice wage. None of the parties have urged such a draconian resolution of this difficult issue.¹¹

¹¹ Such a rule would have disastrous consequences for apprenticeship and might lead some to argue that under *Travelers* the acute indirect economic effect of such a rule should lead to preemption. This analysis leaves the state with no non-preempted alternatives, another absurd situation.

IV. The Intent Of The Congress That Passed ERISA Controls.

Dillingham offers little in the way of legislative history or historical background in support of its reading of the text of ERISA. Instead, Dillingham suggests that the failure of Congress in 1994 to amend ERISA supports its position. The notion that Congress' failure in 1994 to act on a bill, which raised issues well beyond the narrow issue in this case, is evidence of congressional intent in passing ERISA in 1974 is misplaced and indicative of the lack of support in the relevant legislative history for Dillingham's position. This Court has made the point that the intent of a later Congress does not control the meaning of a law enacted by an earlier Congress. This principle was set out in *Mackey*:

[T]he opinion of this later Congress as to the meaning of a law enacted 10 years earlier does not control the issue. *United Airlines Inc. v. McMann, supra*, at 200, n. 7, 98 S.Ct., at 448, n. 7. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960).

. . . . "It is the intent of the Congress that enacted [the section] . . . that controls." *Teamsters v. United States*, 431 U.S. 324, 354, n. 39, 97 S.Ct. 1843, 1864, n. 39, 52 L.Ed.2d 396 (1977).

Mackey, 486 U.S. at 841. Citing this later inaction by Congress tacitly admits that there is no legislative history dating from ERISA's original enactment to support the position of Dillingham and its *Amici*.

Even if the actions of a later Congress were instructive as to legislative intent, the meaning of the actions of this Congress are less than clear. The House passed H.R. 1036 by a vote of 276 ayes to 150 noes. 139 CONG. REC. H8977-78 (1993). The similar Senate bill, S. 1580, was introduced in the Senate a few days before the House vote by Senators Specter and D'Amato,¹² and Senator Specter described support as bipartisan. 139 CONG. REC. S14,194 (1993). The bill in question went beyond the narrow issue raised in this case, and included language on mechanics liens and the general regulation of apprenticeship. It is speculation to say why it did not move further in the Senate after passing the House.

V. Limitation Of The Apprentice Wage To Registered Apprentices Does Not Impose State Standards On Plans Independent Of Federal Standards Under the Fitzgerald Act.

Dillingham's, and especially its *Amici*'s, reliance on the failure of the Senate to join the House in passing H.R. 1036, reflects concern about how the proposed law would affect the rules for program approval. Concerns about state obstruction in the approval process were expressed at that time. Brief of *Amicus Curiae* ABC Golden Gate at 6, 13, 27. This argument is directed, not to the issue in this case, but to what are described as previous abuses of the approval process¹³ and to claims that state regulation of

¹² It was the House bill, not S. 1580, which was offered in the Senate by Senator Kennedy. 140 CONG. REC. S8381 (1994).

¹³ *Amicus Curiae* Coalition to Preserve ERISA Preemption is incorrect in asserting, in its Brief at 16, that Dillingham was

program approval will unfairly disadvantage certain programs. Brief of *Amicus Curiae* ABC Golden Gate at 4, n.8, 12-13; Brief of *Amicus Curiae* Coalition to Preserve ERISA Preemption at 14-15; Brief of *Amicus Curiae* Associated General Contractors at 14-18. These concerns have already been addressed in cases such as *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992) and *Southern California ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992) ("*SoCal ABC*"). It is true that, if the approval process includes criteria which are not drawn from the Fitzgerald Act regulations (for example, a requirement that a program be funded by a trust fund, or that a program be union-sponsored) then the limitation of the apprentice wage to those in approved programs would also be a way of enforcing that independent state regulation. If, on the other hand, the approval process only considers criteria drawn from the Fitzgerald Act, then using a definition of registered apprentice to limit the apprentice wage does not introduce any additional state regulation.

One point of *MacDonald* and *SoCal ABC* was to level the playing field and to remove obstacles to those contractors who wanted to provide apprenticeship training meeting the federal standards. *Dillingham* goes well beyond that goal, and opens the door to programs with

penalized because Arceo's apprentices were in a plan which had been denied approval. The plan was slow to complete its application but when it did it was approved. California's Opening Brief at 14-15.

no standards and no real training. The result is to undercut the effects of *MacDonald* and *SoCal ABC*, because those bona fide programs which had suffered difficulty or delayed approval would find that they had finally gained approval only to have the benefits of the approval vanish.¹⁴

Dillingham's *Amici* seem to assume that approval is unimportant and that sham programs would fade away while high quality apprenticeship programs would prevail in the marketplace, because the market will reward the best programs. This is plausible so long as the competition is only among programs which provide bona fide apprenticeship training. However, when a sham program is in the business of providing low wage workers just for the length of a public works job, and is not in the business of providing training, the nature of "the market" for the contractor is very different. Contractors who are seeking the lowest wage and lowest cost for one job will not be concerned about the quality of training. *Dillingham* thus distorts the labor market for apprenticeship programs just as bad currency drives good out of circulation. Apprenticeship programs which are designed to provide low wage workers, and not to train, do not compete in the labor market with bona fide apprenticeship, but instead end the possibility of fair competition among programs in a fair labor market and jeopardize real training.

¹⁴ This would also be true for new programs which are willing to meet the federal criteria.

VI. Conclusion

For the reasons stated above and in California's Opening Brief, the judgment of the Ninth Circuit should be reversed.

Dated: September 3, 1996, San Francisco, California

Respectfully submitted,

JOHN M. REA, Chief Counsel
(Counsel of Record)

VANESSA L. HOLTON,
Asst. Chief Counsel

FRED D. LONSDALE, Sr. Counsel

JAMES D. FISHER, Counsel

SARAH COHEN, Counsel

State of California
Department of Industrial
Relations

Office of the Director
Legal Unit

45 Fremont Street, Suite 450

San Francisco, CA 94105

(Mailing Address:

P.O. Box 420603

San Francisco, CA 94142)

(415) 972-8900

*Counsel for State
Petitioners Department of
Industrial Relations Division
of Apprenticeship Standards*

H. THOMAS CADELL, JR.,
Chief Counsel

RAMON YUEN-GARCIA,
Counsel

State of California
Division of Labor
Standards Enforcement

45 Fremont Street

Suite 3220

San Francisco, CA 94105

(Mailing Address:

P.O. Box 420603

San Francisco, CA 94142)

(415) 975-2060

*Counsel for State
Petitioners Division of
Labor Standards
Enforcement and County
of Sonoma*

11
No. 95-789

Supreme Court, U.S.
FILED

JUN 17 1996

In the Supreme Court of the United States THE CLERK

OCTOBER TERM, 1995

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FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

DREW S. DAYS, III
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

JAMES A. FELDMAN
*Assistant to the Solicitor
General*

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

J. DAVITT MCATEER
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

EDWARD D. SIEGER
*Attorney
Department of Labor
Washington, D.C. 20210*

36 pp

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act (ERISA) preempts a state law that requires contractors on state public works projects to pay prevailing journeyman wage rates to employees in apprenticeship programs that have not received state approval, but allows lower apprenticeship rates to be paid to employees in state-approved programs.

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INTEREST OF THE UNITED STATES

This case presents questions concerning the scope of the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144, and its relationship to the National Apprenticeship Act (Fitzgerald Act), 29 U.S.C. 50. The Secretary of Labor is primarily responsible for administering and enforcing Title I of ERISA, see 29 U.S.C. 1002(13), 1136(b), and for formulating and promoting sound labor standards for apprentices and cooperating with state agencies under the Fitzgerald Act, 29 U.S.C. 50. The United States therefore has a substantial interest in the resolution of the question presented.

STATEMENT

1. In 1987, respondent Dillingham Construction Company was awarded a contract to build a detention facility

for Sonoma County, California. Pet. App. 25. When work began, a subcontractor, respondent Sound Systems Media, was subject to a collective bargaining agreement with the International Brotherhood of Electrical Workers (IBEW) Local 202 that included certain apprentice wage rates that were lower than the applicable journeyman rates. The agreement also required payments to a state-approved joint apprenticeship training committee (JATC). *Id.* at 25-26.¹ In May 1988, after a few months of work, IBEW Local 202 withdrew its representation of Sound Systems' employees. *Id.* at 26.

In June 1988, Sound Systems entered a new collective bargaining agreement with the National Electronic Systems Technicians Union (NESTU). The agreement once again included a scale of apprentice wages and required Sound Systems to contribute to the JATC associated with the new union—the Electronic and Communications Systems Joint Apprenticeship and Training Trust (E & C JATC). Pet. App. 26. Sound Systems thus began relying on the E & C JATC for apprentices and paid them in accordance with the agreed-upon apprentice wage scale. *Ibid.* There is no evidence that Sound Systems provided any training for those apprentices. *Id.* at 28 n.3.

2. This case arises because Sound Systems' payment of apprentice wages to individuals hired from the E & C JATC program violated provisions of California's prevailing wage statute. Under that law, which is modeled on the federal Davis-Bacon Act, 40 U.S.C. 276a(b), "[c]ontractors who are awarded public works projects agree to pay prevailing wages to all their construction employees

¹ An apprenticeship training committee consists of persons designated by the sponsor of an apprenticeship program to administer the program. 29 C.F.R. 29.2(i). Such committees may be either joint (with equal numbers of employer and employee representatives) or unilateral (sponsored by a management group or an individual employer or by a labor organization). *Ibid.*; Cal. Labor Code § 3075 (West 1989). JATCs "are the source of the apprentices and provide for their training." Pet. App. 5, 26.

at the journeyman level in specified trades." Pet. App. 3; see Cal. Labor Code §§ 1771, 1773, 1774 (West 1989). However, "[p]ublic works contractors that employ apprentices can pay them an amount lower than the prevailing journeyman wage so long as those apprentices are part of an approved apprenticeship program." Pet. App. 3-4; see Cal. Labor Code § 1777.5 (West 1989 & Supp. 1995) (permitting contractors to employ "properly registered apprentices upon public works," but requiring that they be "in training under apprenticeship standards and written apprentice agreements under" California statutes regarding apprenticeship programs). Contrary to those provisions, the E & C JATC did not apply for state approval for its apprenticeship training program until August 1989, and it did not receive such approval until October 1990. Pet. App. 27. Thus, throughout the period from June 1988 until October 1990, Sound Systems was paying less-than-journeyman wages to individuals who were not participants in a state-approved apprenticeship program.

The substantive standards and mechanisms employed by California in approving apprenticeship programs are closely related to federal standards for such programs under the National Apprenticeship Act, 29 U.S.C. 50 *et seq.*, popularly known as the Fitzgerald Act. See p. 27 n.9, *infra*. Since its enactment in 1937, the Fitzgerald Act has "authorized and directed" the Secretary of Labor

to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship * * * [and] to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship.

29 U.S.C. 50; see Act of Aug. 16, 1937, ch. 663, 50 Stat. 664.

Pursuant to the Fitzgerald Act, the Secretary has issued regulations "to set forth labor standards to safeguard the welfare of apprentices." 29 C.F.R. 29.1(b). Under those standards, an apprenticeship program must be based on "an organized, written plan embodying the terms and conditions of employment, training and supervision" of apprentices. 29 C.F.R. 29.5(a). Apprentices must be "employed to learn a skilled trade," 29 C.F.R. 29.2(e), which requires, *inter alia*, "a minimum of 2,000 hours of on-the-job work experience" and "related instruction to supplement the on-the-job training." 29 C.F.R. 29.4(c), (d); see also 29 C.F.R. 29.5(b)(2), (4). Apprenticeship programs must satisfy equal opportunity requirements, 29 C.F.R. 29.5(b), and their training programs must be given "in a classroom through trade or industrial courses" or other forms of approved study, 29 C.F.R. 29.5(b)(4). The regulations also require, *inter alia*, that apprentices be paid "[a] progressively increasing schedule of wages," that "[t]he numeric ratio of apprentices to journeymen" be "consistent with proper supervision, training, safety, and continuity of employment," and that the program provide "[a]dequate and safe equipment and facilities for training and supervision," 29 C.F.R. 29.5(b)(5), (7), (9).

The regulations do not impose requirements on all apprenticeship programs. However, the regulations do provide that "[e]ligibility for various federal purposes is conditioned upon a program's conformity with" the regulatory standards and proper registration of the program. 29 C.F.R. 29.3(a). Those "federal purposes" include "any federal contract, grant, agreement or arrangement dealing with apprenticeship, and any Federal financial or other assistance * * * pertaining to apprenticeship." 29 C.F.R. 29.2(k). For example, federal contractors may pay apprentices less than the prevailing rate for journeymen under federal statutes such as the Service Contract Act or the Davis-Bacon Act only if the apprentices come from approved apprenticeship programs. See 29 C.F.R.

4.6(p), 5.5(a)(4)(i). The regulations thus provide an incentive for employers to see to it that their apprentices are enrolled in programs that satisfy federal standards and are properly registered.

Pursuant to the Fitzgerald Act's directive to the Secretary to "cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship," 29 U.S.C. 50, the Act's apprenticeship standards are administered through a cooperative federal-state arrangement. An employer may seek approval for and register an apprenticeship program for federal purposes either with a federally recognized state apprenticeship agency or council (SAC), to which the power to grant Fitzgerald Act approval is delegated, or with the Department of Labor's Bureau of Apprenticeship and Training (BAT) if no such agency is recognized in the employer's state. See 29 C.F.R. 29.3(a), 29.12(a), 29.12(e)(2). California has such a federally approved apprenticeship council, within petitioner Division of Apprenticeship Standards. Pet. App. 2-3; J.A. (Jesswein Aff. ¶ 3). Indeed, under the decision of the California Supreme Court in *Southern California Chapter of Associated Builders and Contractors, Inc. v. California Apprenticeship Council*, 841 P.2d 1011 (1992), even when the State is approving apprenticeship programs for its own purposes, it may not apply standards for approval that are different from those in the Fitzgerald Act regulations.

3. In 1989, the State began to investigate charges that Sound Systems was paying lower-than-journeyman wages to apprentices from the E & C JATC, even though that program had not received state approval and its apprentices were unregistered. After an investigation, the State issued a notice of noncompliance to Dillingham and directed the County of Sonoma to withhold monies from Dillingham based on the failure of its subcontractor—Sound Systems—to comply with the State's prevailing wage law. The amount of money withheld equaled the difference between the apprenticeship wages paid to the

unregistered E & C JATC apprentices and the journeyman rates that should have been paid, plus applicable penalties. Pet. App. 27. See Cal. Labor Code § 1775 (West 1989 & Supp. 1996).

4. Dillingham and Sound Systems commenced this declaratory judgment action in federal court, arguing, *inter alia*, that ERISA preempts the state enforcement action.² The district court granted summary judgment for the State. Pet. App. 24-26.

First, the district court concluded that Sound Systems' apprenticeship program was an ERISA plan. Pet. App. 32-33. The court noted that ERISA defines "employee welfare benefit plan" to include apprenticeship and training programs established by an employer, employee organization, or both, and the court reasoned that Sound Systems purported to establish such a program. *Id.* at 33 (citing 29 U.S.C. 1002(1)). The court also concluded that California's approval scheme for apprenticeship programs "relates to" ERISA plans within the meaning of Section 514(a) of ERISA, 29 U.S.C. 1144(a), which provides that the provisions of ERISA "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan" covered by the Act. Pet. App. 34-35.

The district court held, however, that California's authority to establish and enforce minimum apprenticeship standards was saved from preemption by Section 514(d) of ERISA, 29 U.S.C. 1144(d). Pet. App. 40. That

² Dillingham and Sound Systems also argued that ERISA preempts state attempts to force Sound Systems "to participate in or make contributions to [IBEW's JATC]." First Amended Complaint, ¶ 29. The state disclaimed any attempts to do so, however, see Defendant Division of Apprenticeship Standard's (DAS)'s Responses to Plaintiff's Interrogatories at 1-3, and the district court addressed only Sound Systems' payments to workers. Pet. App. 27-28. Dillingham and Sound Systems also argued that the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, preempted the state enforcement action. The district court rejected that argument (Pet. App. 40-50), and the court of appeals did not reach it.

Section provides that "[n]othing in [Title I of ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulation issued under such law." In the court's view, "preemption of the state approval requirement would unquestionably impair the purposes of the Fitzgerald Act and its regulations within the meaning of ERISA's savings clause." Pet. App. 39-40. The court also construed the State's approval requirement as "in-sur[ing] the integrity of apprenticeship programs and protect[ing] the public and would-be apprentices from fraudulent programs which result in inadequately-trained or abandoned apprentices." Pet. App. 39. Therefore, the court concluded, it fell "squarely" within the articulated purpose of the Fitzgerald Act and Department of Labor regulations, which would be impaired if ERISA preempted it. *Ibid.* (citing 29 C.F.R. 29.1).

5. The court of appeals reversed. Pet. App. 1-22. The court agreed with the district court that the program Sound Systems established through the E & C JATC was an ERISA plan. *Id.* at 10-11. Indeed, the court appeared to assume that *all* apprenticeship programs were ERISA plans, stating that "an apprenticeship program established for the purpose of providing apprenticeship training falls within the plain meaning of section 1002(1)'s definition of 'employee welfare benefit plan.'" Pet. App. 11; see also *id.* at 13-14 ("an apprenticeship training program is an employee benefit plan for purposes of ERISA"). The court then reasoned that "the application of a state's prevailing wage law to allow payment of lower apprenticeship wages to employees in approved apprenticeship programs 'has the effect, and possibly the aim,' of encouraging participation in state approved ERISA [apprenticeship] plans." Pet. App. 14 (quoting *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555, 1559 (10th Cir.), cert. denied, 506 U.S. 953 (1992)). Because "permitt[ing] [a State] to use a prevailing wage scheme to single out certain ERISA plans

over other ERISA plans" would permit a State "covertly [to] disturb or alter ERISA plans," the court held that "the application of California's prevailing wage law in this case 'relates to' an ERISA plan and thus falls under ERISA's preemption clause." Pet. App. 14-15.

The court of appeals also held that enforcement of the State's prevailing wage law was not saved by Section 514(d) of ERISA. Pet. App. 16-17. In the court's view, preemption of the State's prevailing wage law would not "impair" the Fitzgerald Act or its implementing regulations because "the Fitzgerald Act does not rely on state laws for enforcement and includes no clause 'preserving' nonconflicting state laws." *Id.* at 17. The court recognized that the Secretary of Labor's regulations provide standards for either federal or state approval and recognition of apprenticeship programs for federal purposes. *Ibid.* State approval was nonetheless not a way of enforcing the Fitzgerald Act, the court concluded, because the Fitzgerald Act "merely seeks to facilitate the development of apprenticeship programs—it does not mandate apprenticeship programs or seek to discourage other training programs." *Id.* at 18. In the court's view, "even if the application of the prevailing wage law is in the furtherance of the objectives of the Fitzgerald Act, it is not an enforcement mechanism of federal law, and to the extent that its enforcement in this case is preempted by ERISA, federal law is not impaired." *Ibid.*³

SUMMARY OF ARGUMENT

Proper resolution of the preemption issue in this case turns on the answers to three questions. The first question is whether the entity from which Sound Systems obtained its apprentices is an ERISA plan. If not, ERISA has no preemptive effect in this case. Second, if the

³ The court of appeals also rejected the State's arguments that Dillingham was estopped from challenging the State's prevailing wage law and that preemption did not apply because the State was acting as a market participant, not as a regulator. Pet. App. 18-21.

apprenticeship program is an ERISA plan, the state law at issue here—the State's rule that public works contractors may pay apprentice wages only to those in state-approved apprenticeship programs—would be "superse[d]" by ERISA only if it "relate[s] to" that ERISA plan. 29 U.S.C. 1144(a). Finally, even if the state law does "relate to" an ERISA plan, Section 514(d) of ERISA would preserve it if preemption would "impair" the Fitzgerald Act and its implementing regulations. We address each of those questions in turn.

I.A. Section 3(1)(A) of ERISA defines "employee welfare benefit plan" to include any "plan, fund, or program" established by an employer to the extent it provides certain enumerated employee benefits, including "apprenticeship or other training programs." As interpreted by regulations issued by the Secretary of Labor, that definition does not encompass all apprenticeship and training programs. Instead—as illustrated by this Court's decision in *Massachusetts v. Morash*, 490 U.S. 107 (1989), with respect to vacation benefits—the basic distinction is between apprenticeship and training programs for which the employer has set aside separate funds (which are ERISA plans) and those supported out of an employer's general assets (which are not ERISA plans). Applying that analysis, we agree with the courts below that the plan from which Sound Systems obtained its apprentices was an ERISA plan, since it was established to provide an apprenticeship training program and since Sound Systems was obligated to make periodic payments to fund it.

I.B. The state law permitting contractors to pay lower wages to apprentices from state-approved programs does not, however, "relate to" an ERISA plan. Although it undoubtedly encourages state contractors to obtain apprentices from state-approved apprenticeship training programs, such programs may be either ERISA plans or non-ERISA programs. Since the State law is entirely neutral with respect to whether the employer chooses to

achieve the offered benefit (the right to pay lower wages on state public works projects) through an ERISA or a non-ERISA plan, the law relates to apprenticeship training in connection with state projects, not to an ERISA plan.

II. Finally, even if the state law could be said to "relate to" an ERISA plan, it would be saved by Section 514(d) of ERISA because preemption of state law in this area would substantially "impair" the federal program for encouraging sound standards for apprenticeship training under the Fitzgerald Act and its implementing regulations. The Act and its regulations envision a federal-state cooperative effort to promote uniform and sound apprenticeship standards, to encourage employers to offer apprenticeship training, and to protect those who enroll in such programs from abusive practices. Such a joint effort would be substantially frustrated if ERISA prohibited the States from promoting the federal-state standards developed under the Fitzgerald Act through laws like the one at issue in this case.

ARGUMENT

I. CALIFORNIA'S DECISION TO PERMIT STATE CONTRACTORS TO PAY APPRENTICESHIP WAGES ONLY TO APPRENTICES FROM STATE-APPROVED PROGRAMS IS NOT PREEMPTED BY SECTION 514 OF ERISA

A. Not All Apprenticeship Training Programs Are ERISA Plans

Section 514(a) of ERISA supersedes state laws that relate to employee benefit *plans*, but not laws that merely relate to employee *benefits*. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7-8 (1987). Accordingly, the initial preemption inquiry is whether the apprenticeship program that respondent Sound Systems purported to establish through the E & C JATC was an ERISA plan. We agree with the lower courts in this case that it was, although in our view the analysis employed by those courts was incomplete. This issue deserves somewhat extended dis-

cussion, because it substantially affects the analysis of the "relates to" issue in this case, where in our view the court of appeals erred.

1. Section 3(1)(A) of ERISA defines "employee welfare benefit plan" to include any "plan, fund, or program" established or maintained by an employer, employee organization, or both, to the extent it provides, *inter alia*, "apprenticeship or other training programs" for its participants and beneficiaries. 29 U.S.C. 1002(1)(A). As we explained in our Brief as Amicus Curiae, *Lennes v. Boise Cascade Corp.*, No. 91-707, at 7-10, however, that does not mean that all apprenticeship or other training programs are ERISA plans.

First, interpretive regulations promulgated by the Secretary of Labor exclude from ERISA coverage employee benefit plans that provide compensation for on-the-job training. See 29 C.F.R. 2510.3-1(b)(3)(iv) (excluding "[p]ayment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training"). As the Secretary explained in proposing that exclusion, "[a]lthough [29 U.S.C. 1002(1)] of [ERISA] could be read to include job-skill training within the term 'welfare plan,' such training is virtually inseparable from an employee's normal duties for which compensation is paid, and therefore is not treated as an employee benefit plan." 40 Fed. Reg. 24,643 (1975). That regulatory exclusion is just one part of a broader coverage exclusion for a variety of "payroll practices" (such as overtime pay, sick pay, and vacation pay) that amount to nothing more than payment of ordinary compensation out of the employer's general assets. 29 C.F.R. 2510.3-1(b). Indeed, another part of the payroll practices regulations (the exclusion of vacation pay) has been upheld by this Court. *Massachusetts v. Morash*, 490 U.S. 107 (1989). Accordingly, in the Secretary of Labor's view, the fact that an employer provides on-the-job training does not mean that such training is provided through an ERISA plan.

Second, the Secretary's regulations exclude various plans that provide for classroom instruction. Specifically, the regulations exclude so-called "[u]nfunded scholarship program[s], under which payments are made solely from the general assets of an employer or employee organization." 29 C.F.R. 2510.3-1(k); see 40 Fed. Reg. 34,527 (1975). The Department of Labor has also issued an advisory opinion stating that an in-house professional development program maintained by an accounting firm to provide continuing education for its licensed accountants, financed by the firm's general assets, is not an employee welfare benefit plan as defined in ERISA. U.S. Dep't of Labor ERISA Advisory Op. No. 83-32A (June 21, 1983); see also U.S. Dep't of Labor ERISA Advisory Op. No. 76-01 (Feb. 21, 1976) (tuition refunds to bank employees paid from the bank's general assets do not constitute a covered plan). Accordingly, in the Secretary's view, unfunded classroom training programs, whether provided directly by an employer or purchased from an educational institution, do not constitute ERISA plans.

If neither on-the-job training nor classroom training paid for out of an employer's general assets is an ERISA plan, then an unfunded program—such as an apprenticeship program—providing both types of training is not an ERISA plan either. On the other hand, apprenticeship programs that are separately funded—as are those financed by joint apprenticeship trusts established under 29 U.S.C. 186(c)—are covered by ERISA. The rationale for such a distinction is explained in *Massachusetts v. Morash*, 490 U.S. at 112-119. In *Morash*, the Court approved the Secretary's similar determination that only funded—and not unfunded—vacation pay arrangements are covered by ERISA. The Court explained that "[i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds." *Id.* at 115. The existence of separate rate plan assets makes funded plans susceptible to

the kinds of fiduciary abuses that ERISA was designed to prevent. The Court accordingly upheld the Secretary's payroll practice regulation insofar as it excludes unfunded vacation benefits from coverage.

In reaching that conclusion, the Court also noted that "the extension of ERISA to claims for vacation benefits would vastly expand the jurisdiction of the federal courts, providing a federal forum for any employee with a vacation grievance." 490 U.S. at 118-119. Similarly, if all employer-provided training is covered by ERISA, employees would have the right to bring benefit claims or fiduciary-breach claims in federal court under Section 502(a) of ERISA, 29 U.S.C. 1132(a), each time their employer denied them an opportunity to attend a training course. ERISA was not intended to sweep so broadly; the Secretary quite properly exercised his rulemaking authority under Section 505 of ERISA, 29 U.S.C. 1135, to define the proper scope of the term "employee welfare benefit plan."

As this Court has recognized, the Secretary's coverage regulations are entitled to deference. *Massachusetts v. Morash*, 490 U.S. at 115-118. Excluding unfunded apprenticeship programs from ERISA coverage is a permissible interpretation of the statutory language and is fully consistent with Congress's intent. Accordingly, although some (funded) apprenticeship programs are ERISA plans, other (unfunded) apprenticeship programs are not.

2. The plan at issue in this case—the E & C JATC—is an ERISA plan under the above principles. Initially, the E & C JATC fits the statutory definition because it was established or maintained by employers, including Sound Systems, and an employee organization (NESTU), to provide an apprenticeship "program" for participants and beneficiaries of contributing employers and unions. In addition, the E & C JATC qualifies as a plan under the regulations because training under the plan was not provided out of the employer's general assets; Sound Systems was obligated to contribute to the trust, which

in turn financed the training for the apprentices at issue. Pet. App. 26. By establishing the E & C JATC as its apprenticeship program, Sound Systems thereby established a program that was an ERISA plan.⁴

B. The Application Of California's Prevailing Wage Law To Permit State Contractors To Pay Apprenticeship Wages Only To State-Registered Apprentices In Approved Plans Does Not Relate To An ERISA Plan

Under Section 514(a) of ERISA, 29 U.S.C. 1144(a), ERISA supersedes all state laws that "relate to" an ERISA plan.⁵ This Court has explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). Thus, a state law may "relate to" an ERISA plan "even if the law is not specifically designed to affect such plans, or the effect is only indirect." *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 (1992). On the other hand, "[s]ome state [laws] may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a

⁴ The Court need not reach the contention of amicus AFL-CIO that an ERISA apprenticeship program includes only the plan for financially supporting an apprenticeship program, not the set of labor and other standards followed by the program in training apprentices. See AFL-CIO Amicus Br. on Petition for Writ of Certiorari 5-15. Assuming that an ERISA apprenticeship plan includes more than just the mechanism of financial support, we argue below that the California law at issue in this case does not "relate to" ERISA plans and in any event is saved by 29 U.S.C. 1144(d).

⁵ Because ERISA broadly defines "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State," 29 U.S.C. 1144(c)(1), and the State acted here to enforce its prevailing wage statute, the preemption inquiry should not turn on whether the state law concerns the State's actions as a market participant or instead the State's role as regulator of private conduct. See Pet. App. 21.

finding that the law 'relates to' ERISA plans, *Shaw*, 463 U.S. at 100 n.21, "as is the case with many laws of general applicability." *Greater Washington Bd. of Trade*, 506 U.S. at 130 n.1. In this context, a generally applicable statute that "makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan" cannot be said to relate to it. *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139 (1990). Finally, especially where preemption would oust the States of long-standing authority to regulate an area of traditional state concern and regulation (here, employee training and wages and the terms of state contracts), the analysis must "look * * * to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995).

1. Applying the above principles, the rule at issue here does not relate to an ERISA plan. As applied in this case, the California law permits state contractors to pay lower wages to apprentices enrolled in registered apprenticeship programs than they can pay to other employees, including those enrolled in non-registered apprenticeship programs. The law therefore undoubtedly encourages state contractors to provide training for their employees through apprenticeship programs that satisfy the State's substantive standards, and it discourages contractors from providing training through programs that fail to satisfy those standards or that fail to seek state registration.

We may assume that if, as the court of appeals believed, all apprenticeship training programs are necessarily ERISA plans, the State's law would likely relate to such plans. In that event, it could even be argued that the State's law has a "reference to" ERISA plans, *Shaw*, 463 U.S. at 97, since the very subject of the State's law would be a category composed entirely and necessarily of ERISA plans. Although the State's scheme would not directly impose requirements on such plans (since con-

tractors on state projects would remain free not to employ apprentices at all, or to pay all the relevant employees at journeyman's rates), the immediate effect of the scheme would be to encourage certain sorts of ERISA plans and discourage others. That is the sort of direct state interference that ERISA's preemption clause was intended to prohibit.⁶ Cf. *Shaw*, 463 U.S. at 97 (holding preempted state law requiring employers to structure their benefit plans to pay pregnancy benefits); *Travelers*, 115 S. Ct. at 1681, 1685 (preemption problems raised by forcing employers to choose particular plans or binding administrators to particular coverage).

As explained above, however, not all apprenticeship programs are ERISA's plans. See pp. 11-13, *supra*. Under the Secretary's regulations, apprenticeship training programs that are paid for out of separate funds set aside for that purpose are ERISA plans, while programs that are paid for out of the employer's general assets are not. Both sorts of apprenticeship programs may receive state approval. The State's approval requirements concern the type of training that must be offered to apprentices, including such matters as the numbers of hours of classroom training that apprentices must receive, the ratio of apprentices to journeymen on the job, and the stages at which apprentice wages must gradually rise to the journeyman level. The requirements therefore do not discriminate

⁶ A separate portion of the same prevailing wage law at issue in this case, California Labor Code § 1777.5, appears to require employers on public works projects who employ apprentices either to make contributions to existing funds that "administer and conduct [the] apprenticeship program" or, in the alternative, to make contributions in like amount to the California Apprenticeship Council, a state body. See Pet. App. 62. A provision of that sort could be interpreted to require public works contractors who wish to employ apprentices either to do so through a funded apprenticeship program (*i.e.*, an ERISA plan) or to pay a penalty to the State. If it were interpreted in that way, such a provision would raise substantial preemption issues under ERISA, since it would interfere in the employer's decision about whether to provide apprenticeship training through an ERISA plan or otherwise. That portion of Section 1777.5 is not an issue in this case. See note 2, *supra*.

in favor of or against ERISA plans, since they neither require or prohibit—nor encourage or discourage—apprenticeship programs to be operated as ERISA (*i.e.*, funded) plans or non-ERISA (*i.e.*, unfunded) plans.⁷ Accordingly, both ERISA and non-ERISA plans may provide registered apprentices to employers who want them. Although a contractor may pay the lower, apprentice wage scale only to registered apprentices, it is up to the contractor whether to train such apprentices through an ERISA plan or a non-ERISA training program.⁸

Nor does the State's rule that a contractor may pay lower wages only to registered apprentices impose any

⁷ Different considerations would be implicated by California's application of its "need" requirement to deny approval of a new program that would adversely affect an existing one. The California Supreme Court, however, held that provision to be preempted by ERISA. *Southern Cal.*, 841 P.2d at 1021-1025. That court concluded "that the only apparent purpose of [this requirement] is to restrict competition among apprenticeship programs." *Id.* at 1029; see also *Associated Gen. Contractors v. Smith*, 74 F.3d 926, 930 (9th Cir. 1996) (ERISA preempts State's authority to deny expansion of an apprenticeship program). The State's use of its "need" requirement could defeat the formation of new ERISA apprenticeship programs, and if most existing apprenticeship programs are ERISA plans, the "need" requirement could effectively require employers to use existing ERISA plans as their source of apprentices.

⁸ Most state-approved apprenticeship programs in the construction industry in California appear to be ERISA plans. The Department of Labor's BAT reports that between April and June 1994, California had 175 joint and 13 unilateral active apprenticeship programs in the construction industry. Joint programs (JATCs) must be funded to comply with Section 302(c)(6) of the Labor Management Relations Act, 29 U.S.C. 186(c)(6), and they therefore must be ERISA plans. Some of the unilateral plans may also be funded plans. The preemption analysis, however, is not affected by the fact that employers may choose to use funded plans for a variety of reasons—including, in the construction industry, the typically temporary nature of the employment relationship between a particular employer and employee—having nothing to do with the law at issue in this case.

obligation on ERISA plans themselves. Although employers engaged in public works construction may seek to establish or participate in apprenticeship programs that satisfy the State's standards, ERISA apprenticeship programs remain free to offer training that differs from, or is in addition to, that necessary for state approval. In short, the state law in no way "mandate[s] employee benefit structures or their administration." *Travelers*, 115 S. Ct. at 1678. Compare *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (holding preempted Pennsylvania law that prohibited "plans from * * * requiring reimbursement [from the beneficiary] in the event of recovery from a third party"); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (holding that law requiring plans to include mental health benefits in their policies "clearly 'relate[s] to' welfare plans governed by ERISA"); *Shaw*, 463 U.S. at 97 (holding that law requiring "employers to pay employees specific benefits clearly relate[d] to [ERISA] plans"); *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 524 (1981) (holding preempted New Jersey statute that "eliminate[d] one method for calculating pensions benefits * * * that is permitted by federal law").

3. As we have explained, the California rule at issue here imposes no requirements on ERISA plans. Although it provides an incentive for employers to act in a certain way, it leaves it open for them to do so through ERISA or non-ERISA plans. The analysis in this case is therefore controlled by the analysis in two cases in which this Court has held state laws not preempted—*Shaw* and *Travelers*.

a. One of the features of the state law at issue in *Shaw* was the State's requirement that employers pay certain benefits to employees unable to work because of nonoccupational injuries or illnesses. Under Section 4(b)(3) of ERISA, 29 U.S.C. 1003(b)(3), plans maintained "solely for the purpose of" providing such disability insurance are excluded from coverage as ERISA plans. In *Shaw*, this Court noted that some benefit plans

both pay disability insurance and provide other benefits, and therefore do not come within the exclusion in Section 4(b)(3). 463 U.S. at 108. Nonetheless, the Court held that the State's law was not preempted, employing reasoning directly applicable to this case. The Court explained that "while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." 463 U.S. at 108. Therefore, the Court held, the State could enforce its disability insurance requirements "against those [employers] that provide disability benefits as part of multibenefit plans." *Ibid*.

The same conclusion follows in this case. As in *Shaw*, a State may not require an employer to meet State approval requirements if it wants to set up an ERISA apprenticeship training plan. But *Shaw* makes clear that a State may continue to regulate the substance of apprenticeship—and other—training by private employers, so long as it leaves the employer free to decide whether to provide such training in an ERISA or a non-ERISA program. It follows *a fortiori* that a State may encourage sound apprenticeship practices by encouraging employers on state public works programs to employ apprentices from training programs that satisfy state standards. See also *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (holding that ERISA did not preempt the application of a general state garnishment statute to participants' benefits in the hands of an ERISA plan); *Keystone Chapter, Associated Builders & Contractors v. Foley*, 37 F.3d 945, 960-961 (3d Cir. 1994) (state may require contractors to include employee benefits in the amount of prevailing wages they pay so long as they have the choice of paying in either benefits or cash), cert. denied, 115 S. Ct. 1393 (1995).

b. This Court's decision in *Travelers* elaborates on a similar point. The Court in *Travelers* recognized that "[i]f 'relate to' were taken to the furthest stretch of its indeterminacy, then for all practical purposes pre-

emption would never run its course." 115 S. Ct. at 1677. The Court therefore noted that it must "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Ibid.*

In performing that analysis, the Court relied on a number of factors that are also present in this case. The Court noted that, although the hospital-cost regulatory scheme at issue in *Travelers* does affect the cost of health coverage that ERISA plans (and others) purchase, it "does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself," since plans retained the choice of what type of health coverage to purchase. 115 S. Ct. at 1679. Similarly, as explained above, the application of California's prevailing wage law does not "bind plan administrators to any particular choice" regarding the operation of an ERISA apprenticeship program.

The Court in *Travelers* also noted that rate variations among hospital providers "are accepted examples of cost variation," 115 S. Ct. at 1679, and are not examples of the "conflicting directives" by States "from which Congress meant to insulate ERISA plans," 115 S. Ct. at 1680. Similarly, prevailing wages in different States—or even in different areas of a single State—may vary substantially, and training requirements for membership in skilled trades may also vary among different trades, different communities, and different States. Unless all wage differentials are abolished and all state-imposed training requirements are held preempted, such variation will necessarily continue. As in *Travelers*, that permissible variation does not implicate the interest in uniformity in plan administration that Congress sought to protect.

In addition, the Court in *Travelers* noted that "nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." 115 S. Ct. at 1680. Similarly, employee

training and qualification for membership in a skilled trade—especially on a public works project—is an area that has traditionally been subject to extensive state regulation. Indeed, ERISA defines ERISA plans to include "apprenticeship or other training programs." 29 U.S.C. 1002(1)(A) (emphasis added). If the Ninth Circuit's analysis were correct, it would appear that all state regulation of all employee training programs would be threatened, since employers could simply opt out of state regulation by conducting their training through the mechanism of an ERISA plan. There is no evidence that Congress intended ERISA to supplant state authority throughout the entire sphere of employee training.

Finally, the Court's conclusion in *Travelers* was reinforced by its consideration of the National Health Planning and Resources Development Act of 1974 (NHPDA), Pub. L. No. 93-641, §§1-3, 88 Stat. 2225, repealed Pub. L. No. 99-660, Title VII, § 701(a), 100 Stat. 3799, the goal of which was in part to assist the States to develop rate methodologies like that claimed to be preempted in *Travelers*. See 115 S. Ct. at 1681-1682. The Court noted that

the significant point * * * is that the [NHPDA's] provision for comprehensive aid to state health care rate regulations is simply incompatible with preemption of the same by ERISA. To interpret ERISA's pre-emption provision as broadly as respondents suggest would have rendered the entire NHPDA utterly nugatory, since it would have left States without the authority to do just what Congress was expressly trying to induce them to do by enacting the NHPDA.

115 S. Ct. at 1682.

The same principle applies to this case. As we show below, the Fitzgerald Act was intended to foster a cooperative federal-state relationship to promote uniform

apprenticeship standards that foster employee training and protect apprentices from abuses. Under the Ninth Circuit's decision, however, the State's ability to regulate apprenticeship training consistent with the Fitzgerald Act and its implementing regulations would be severely curtailed or eliminated. That result "would [leave] States without the authority to do just what Congress was expressly trying to induce them to do by enacting [the Fitzgerald Act]."

II. CALIFORNIA'S SCHEME IS IN ANY EVENT SAVED BY SECTION 514(d) OF ERISA, BECAUSE PREEMPTION WOULD IMPAIR THE FITZGERALD ACT AND ITS IMPLEMENTING REGULATIONS

This Court recognized in *Shaw* that even if a state law relates to an ERISA plan, Section 514(d) of ERISA will save the state law to the extent that preemption would "modify" or "impair" another federal law. 463 U.S. at 100-102. Even if California's requirement that state public works contractors may pay lower-than-journeyman wages only to registered apprentices were held to "relate to" ERISA plans, preemption of California's law would "impair" the Fitzgerald Act and its implementing regulations. The court of appeals thus erred in holding that California's law is not saved under Section 514(d) of ERISA.

1. The predominant purpose of the Fitzgerald Act was to institute a joint federal-state effort to encourage employers to provide adequate training to workers who seek to enter skilled trades, while at the same time protecting workers enrolled in apprenticeship programs from abusive employment practices. In 1930, seven years before Congress enacted the Fitzgerald Act, there was a shortage of skilled workers but a large number of young men and women employed in skilled trades who were not receiving organized training. H.R. Rep. No. 945, 75th Cong., 1st Sess. 1-3 (1937). Because the term "apprenticeship" was

used to describe any kind of beginning work experience, including "understudies and helpers and beginners and short-term operation learners," the apprentice experience was not a desirable choice. *To Safeguard the Welfare of Apprentices: Hearings on H.R. 6205 Before a Subcomm. of the House Comm. on Labor*, 75th Cong., 1st Sess. 72 (1937) [*House Hearings on H.R. 6205*] (statement of William F. Patterson, Executive Secretary of the Federal Committee on Apprentice Training). Individual employers did not want to spend money on adequate training for fear that the apprentice would work elsewhere after the training. *Id.* at 64 (statement of Julia O'Connor Parker, National Youth Administration). "Distrust and suspicion" often developed when either employers or workers undertook a training program alone. H.R. Rep. No. 945, *supra*, at 3; see also *House Hearings on H.R. 6205, supra*, at 43-44 (statement of John P. Frey, AFL).

In 1934, the Secretary of Labor created the Federal Committee on Apprentice Training, a group of government officials, employers, and employee representatives. H.R. Rep. No. 945, *supra*, at 2; see also 81 Cong. Rec. 2594 (1937) (statement of Rep. Mead). Its purpose was to encourage "genuine apprentice training under the National Recovery Administration codes and, at the same time, prevent the exploitation of apprentices and the break-down of labor standards." 81 Cong. Rec. 2600 (1937) (Memorandum on the Work of the Federal Committee on Apprentice Training); see also *id.* at 2594 (statement of Rep. Mead); H.R. Rep. No. 945, *supra*, at 2. The Committee could not "compel adherence to its recommendations," but, with cooperating state committees, it assisted employers and employees in setting up apprenticeship systems. S. Rep. No. 1078, 75th Cong., 1st Sess. 3 (1937). The Committee also established minimum standards for apprenticeship relating to "the scale of wages, ratio of apprentices to journeymen, the number of hours to be worked, the various processes of

the trade to be learned, the amount of supplementary school instruction, a written agreement between employer and apprentice, etc." *Ibid.*; see also *House Hearings on H.R. 6205, supra*, at 72-74 (statement of William F. Patterson).

In 1936, President Roosevelt requested a transfer of the Committee's functions to the Department of Labor, which in turn asked Congress to appropriate money for those functions. H.R. Rep. No. 945, *supra*, at 2. Some Members of Congress were reluctant to do so, however, until a law was passed authorizing the Secretary of Labor to perform the functions. *Ibid.* Representative Fitzgerald then introduced a bill that, after the House hearings and reports discussed above, was enacted as the National Apprenticeship Act, popularly known as the Fitzgerald Act. See ch. 663, 50 Stat. 664 (1937); 81 Cong. Rec. 2600, 6631-6641, 8505-8506 (1937).

2. Since 1937, the Department of Labor has recognized that the goals of the Fitzgerald Act can best be carried out by the States. H.R. Rep. No. 945, *supra*, at 5 (Joint Memorandum to the Chairman and Members of the Subcommittee on Appropriations for the Department of Labor, House of Representatives, from Frances Perkins, Secretary of Labor, and J.C. Wright, Assistant Commissioner, United States Office of Education). The States, in turn, have looked to the federal government "for leadership and research and for the determination of national standards." *Ibid.* Under this arrangement, state departments of labor were requested to establish apprenticeship councils. Using standards recommended by the Federal Committee on Apprenticeship as a guide, the state councils then set their own standards and procedures, which industry was asked to follow. After a state council was appointed and prepared its standards and procedures, it became part of the national apprenticeship system by securing recognition from the Department of Labor. See, e.g., Bureau of Apprenticeship, U.S. Dep't

of Labor, *The National Apprenticeship Program* 3-4 (1953); *id.* at 2 (1945).

The Department of Labor has long recognized certain basic standards for apprenticeship, including a minimum number of hours of on-the-job work experience, supplemental classroom instruction, and a progressively increasing scale of wages. Those standards must be set out, with other terms and conditions of employment and training, in a written agreement that is registered with a state apprenticeship council or the Department of Labor. See *The National Apprenticeship Program, supra*, at 1-2 (1945); *id.* at 2-3 (1953); 16 Fed. Reg. 4430 (1951) (standards for certain federal contracts); *id.* at 8884 (1951) (standards for subminimum, apprenticeship wage under Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*). When the Secretary of Labor issued a comprehensive set of regulations in 1977 governing the registration and approval of apprenticeship programs, see 29 C.F.R. Part 29; 42 Fed. Reg. 10,138 (1977), they formalized, but did not alter the essentials of, the joint federal-state cooperative effort to promote apprenticeship training and standards.

3. In passing the Fitzgerald Act, Congress acted "to strengthen the remedial measure which had been inaugurated by the Federal Committee on Apprentice Training." H.R. Rep. No. 945, *supra*, at 3. Three provisions of the Act are of particular importance here. The Act specifically "authorize[s] and direct[s]" the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices." The Act also directs the Secretary "to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship." Finally, it directs the Secretary "to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship." 29 U.S.C. 50.

As the Fitzgerald Act program has evolved since the 1930s, the Secretary has carried out his mandate to "promote" the federal standards and to "extend" their application by "cooperat[ing]" with the States in their efforts to apply regulations consistent with the federally formulated standards on state public works projects. That effort has largely met with success, see Pet. 8 n.2 (citing 28 States that have rules similar to those of California), and it has provided a strong impetus for the use throughout the economy of sound programs of apprenticeship training that comply with federal standards. See Bureau of Apprenticeship and Training, U.S. Dep't of Labor, *Executive Summaries, Apprenticeship 2000, Short Term Research Projects (Apprenticeship 2000)* 45 (1989) (States with SAC programs have approximately twice as many programs as States that rely on BAT for approval).

Under the Ninth Circuit's decision, the cooperative federal-state effort to promote and extend the federal apprenticeship standards is severely curtailed. As the Ninth Circuit itself observed in a later case, the decision below "end[s] any enforcement" of California's rule that state contractors may pay lower wages only to apprentices in programs that comply with the state—and therefore the federal, see p. 6 n.2, *supra*—apprenticeship requirements. *ABC Nat'l Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343, 346 (9th Cir. 1995). Whether that result requires California to allow contractors to pay lower apprentice rates to all workers the contractor labels "apprentices," or whether instead it permits the State simply to require that all workers receive journeyman rates, is of no consequence. In either event, the State—and, by extension, the federal government—will have lost a valuable tool for "promot[ing] the furtherance of labor standards necessary to safeguard the welfare of apprentices" and for "encouraging the inclusion [of the federal standards] in contracts of apprentice-

ship." That result would "impair" the Fitzgerald Act and its implementing regulations.

Preemption of state laws like California's would have other effects on the federal Fitzgerald Act program as well. The Secretary has long believed that the States are best able to register and deregister apprenticeship programs, under federal standards and oversight. Based on that understanding, the Secretary authorizes States that have approved Fitzgerald Act programs to register and deregister programs for federal purposes. By eliminating the ability of the States to apply the federal Fitzgerald Act standards to contractors on the States' own public works programs, the Ninth Circuit's decision, if affirmed by this Court, would eliminate the incentive for States having approved apprenticeship councils to cooperate with the federal government in approving programs for federal purposes. See *Apprenticeship 2000 supra*, at 15-16; see also *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Dep't of Labor and Industry*, 47 F.3d 975, 980-981 (8th Cir. 1995). That result, too, would impair the effective administration of the Fitzgerald Act and its implementing regulations.⁹

4. The Ninth Circuit erred in holding (Pet. App. 18) the ERISA savings clause inapplicable because the state law at issue in this case may not be an "enforcement mechanism" under the Fitzgerald Act. Section 514(d) "does not state that preemption is inapplicable only when it would prevent enforcement of a federal statute. Instead, [it] applies whenever preemption would alter or amend or modify any federal law." *In re Schlein*, 8 F.3d

⁹ Petitioners have not asked this Court to decide whether Section 514(d) of ERISA precludes preemption of state requirements that go beyond the Fitzgerald Act and its regulations. Cf. *Southern Cal.*, 841 P.2d at 1030 (invalidating state approval requirements that go beyond the Secretary's requirements). We therefore address only the state standards that conform to and implement the Secretary's standards.

745, 753 (11th Cir. 1993) (Section 514(d) saves provision in Bankruptcy Code giving debtors a choice of federal or state exemptions). Section 514(d) will not save "a state law [just because it] is consistent with or supplements a federal law. Rather, preemption of the state law must have a negative effect on the functioning of, or standards set forth in, the federal law." *Southern Cal.*, 841 P.2d at 1026; see also *id.* at 1027-1028 (Section 514(d) saves State's authority to approve programs for federal purposes); *Joint Apprenticeship & Training Council of Local 363 v. New York State Dep't of Labor*, 984 F.2d 589, 593 (2d Cir. 1993) (ERISA preemption of State's deregistration of apprenticeship program would frustrate administration of Fitzgerald Act); *J.F.B. Painting & Supply Inc. v. Hudacs*, 620 N.Y.S.2d 612, 614 (App. Div. 1994) (requiring payment of prevailing wages when program has not been registered directly furthers the goals of the Fitzgerald Act, while preemption would frustrate those goals). For the reasons set forth above, preemption of the state law in this case would have such a negative effect on the Fitzgerald Act and its implementing regulations, and the law is therefore saved from preemption by ERISA's savings clause.

5. Preserving a State's authority to apply apprenticeship standards within the compass of the Fitzgerald Act is also a sensible way to reconcile ERISA and the Fitzgerald Act. See *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-376 (1990) (construing Section 514(d) to reconcile ERISA and provisions of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 501). ERISA, which does not provide any substantive standards for apprenticeship plans, is generally designed to protect the interests of plan participants and beneficiaries. 29 U.S.C. 1001(a). An interpretation of the Fitzgerald Act that protects basic standards governing apprentices, including those who participate in apprentice-

ship programs that are subject to ERISA, would be consistent with that purpose. Moreover, applying the state—and thereby, the federal—apprenticeship standards would not defeat the purposes of ERISA preemption: ensuring that plans are subject to a uniform body of benefits law and relieved of administrative and financial burdens of complying with conflicting governmental directives. *Travelers*, 115 S. Ct. at 1677.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

J. DAVITT MCATEER
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

JUNE 1996

8
No. 95-789

Supreme Court, U.S.

FILED

JUN 14 1996

CLERK

In The
Supreme Court of the United States
October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS, COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC., MANUEL
J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

**BRIEF OF AMICI CURIAE
IN SUPPORT OF PETITIONERS'
BRIEF ON THE MERITS**

JAMES P. WATSON
(Counsel of Record)
LAWRENCE H. KAY
STANTON, KAY & WATSON
7801 Folsom Boulevard, Suite 350
Sacramento, California 95826
(916) 381-7868

*Counsel for Amici Curiae
California Apprenticeship
Coordinators Association and
Foundation for Fair Contracting*

QUESTION PRESENTED

Whether Congress intended, in enacting the Employee Retirement Income Security Act, to preempt states' traditional regulation of wages, apprenticeship and state-funded public works construction when that regulation is expressed in a state prevailing wage law that restricts contractors' payment of lower apprentice-specific wages to apprentices duly registered in programs approved as meeting federal standards.

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I. INTEREST OF AMICI CURIAE

With the written consent of all parties, Amici Curiae California Apprenticeship Coordinators Association (hereinafter "CACA") and the Foundation for Fair Contracting (hereinafter "FFC"), file the following brief in support of Petitioners California Department of Industrial Relations (hereinafter "DIR"), Division of Labor Standards Enforcement (hereinafter "DLSE"), and the County of Sonoma (hereinafter "County") seeking reversal of the June 7, 1995 decision of the U. S. Court of Appeals for the Ninth Circuit in *Dillingham Construction v. County of Sonoma*, 57 F.3d 712 (1995), reprinted in the Appendix to the Petition for Writ of Certiorari ("App.") at App. 1-12.

CACA is a California nonprofit corporation whose members represent labor-management joint apprenticeship committees ("JACs") from all of the California construction industries' union/management joint apprenticeship programs. CACA represents over fifty JACs under whose auspices 25,000 registered apprentices are being trained throughout the State of California.

The member JACs of CACA are governed by committees consisting of equal numbers of union representatives and management representatives. The union organizations include every building trades union. Over 25,000 building trades apprentices are registered in programs approved by the State of California. The management organizations include general contractors and subcontractor members of construction trade associations who employ such apprentices on both private and public

construction work in the State of California. Those contractors who perform public construction work in California are governed by the prevailing wage requirements found in California Labor Code section 1720, *et seq.* They benefit from the apprenticeship exemption from the prevailing wage requirement which was challenged in this litigation.

The Foundation for Fair Contracting ("FFC") is a joint labor-management California non-profit corporation which monitors public works projects to determine whether contractors are complying with California's prevailing wage laws. The employer member organizations of FFC include the Associated General Contractors of California, the Association of Engineering Construction Employers and the Engineering and Utility Contractors Association. The members of these associations serve on the JACs and employ apprentices on both private and public construction work throughout Northern California. The union member organizations of FFC include Operating Engineers Local Union No. 3, the Northern California District Council of Laborers, the Northern California District Council of Cement Masons and the California and Vicinity District Council of Ironworkers. All of these unions participate in state approved apprenticeship programs.

Both CACA and FFC believe that the prevailing wage laws and the regulation of apprenticeship programs are important to the taxpayers and citizens of California since they provide a mechanism to allow public agencies in California to contract for meaningful training of young people, minorities and women on state public works construction.

The State of California permits contractors to pay rates lower than prevailing journeyman wage rates to apprentices registered with its Division of Apprenticeship Standards ("DAS"). The State has a vested interest in allowing contractors to pay a lower wage rate to apprentices during their apprenticeship, because it encourages on-the-job training on public works projects.

The Ninth Circuit decision in *Dillingham* will create chaotic conditions in the construction industry. Contractors who employ apprentices will be working under different regulatory requirements, depending upon whether a project is state-funded and governed by the State's prevailing wage laws or is federally funded and subject to the prevailing wage requirements of the federal Davis-Bacon Act, 40 U.S.C. § 276a, *et seq.* *Dillingham* will allow unscrupulous employers to evade the prevailing wage law by enrolling their employees in unapproved sham apprenticeship programs which will permit them to claim the apprenticeship exemption.

CACA and FFC are concerned about the continued viability of their members' JACs and the potential loss of millions of dollars invested in training centers, staff and equipment which have been utilized to train over 25,000 registered apprentices throughout the State of California.

Before the *Dillingham* decision, State approval of each apprenticeship program and registration of apprentices was a precondition for exemption from the prevailing wage law. Only contractors who were certified to train apprentices under the standards of an apprenticeship program approved by the State of California, Division of Apprenticeship Standards, were allowed to pay less than

the prevailing journeyman wage rate for work performed by apprentices. This assured that only bona fide apprenticeship programs would qualify for the reduced rate.

Because of the *Dillingham* decision, confusion and uncertainty exists among CACA's and FFC's labor and management representatives as to how the State of California will enforce the prevailing wage requirements for apprentices. *Dillingham* will make it possible for contractors to establish sham apprenticeship programs which will not provide training to workers, and which will allow contractors to pay any apprentice wage rate they choose, thereby creating a competitive advantage for those contractors not interested in providing meaningful training at fair wages for young people, minorities and women.

II. STATEMENT OF THE CASE

In April 1987, Respondent Dillingham Construction N.A., Inc. (hereinafter "Dillingham"), entered into a public works contract with Petitioner County for the construction of the Sonoma County Main Adult Detention Facility. Dillingham subcontracted part of the work to Elenex Corporation, which in turn subcontracted to Manuel J. Arceo dba Sound Systems Media ("Sound Systems"). *Dillingham, supra*, 57 F.3d at 715-16. The project was subject to California's prevailing wage laws; all non-apprentice employees were required to be paid the predetermined prevailing wage.

On October 20, 1989, petitioner DLSE, after an investigation, filed a Notice to Withhold in the sum of

\$45,103.37 on the funds due Dillingham under the contract with the County, pursuant to California Labor Code section 1727, for the failure of Sound Systems to pay the prevailing wage rates. California Labor Code section 1775 makes Dillingham liable for the failure of its subcontractors to pay prevailing wages. The County withheld the funds as required by law. See Cal. Labor Code § 1727. Dillingham and Sound Systems contested the notice, arguing that some of the Sound Systems workers were "apprentices," and that they were entitled to pay them less than the journeyman rate. The workers were not indentured as apprentices under State law and were not receiving state-approved training.

Since the facts herein are not in dispute, cross motions for summary judgment were filed before the District Court. The District Court rejected Dillingham's motion for summary judgment and granted DLSE's motion, 778 F. Supp. 1522, 1534. In so ruling, the District Court agreed with DLSE's contention that, because California's regulation of apprenticeship programs is part of a cooperative state-federal effort regarding the formulation and promotion of apprenticeship programs, it is saved from preemption by the federal Fitzgerald Act, 29 U.S.C. § 50, as incorporated in ERISA's Savings Clause, 29 U.S.C. § 1144(d). The Court further ruled that since state enforcement of minimum apprenticeship standards constitute a valid "minimum employment standard" they are not preempted by the NLRA under *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) (*Metropolitan*) and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (*Fort Halifax*).

The Ninth Circuit reversed, holding that the restriction of the apprentice prevailing wage to workers who were registered apprentices was preempted by ERISA on the following grounds:

(1) California's application of its prevailing wage law to allow payment of the lower apprentice rate only to employees in "approved" programs had the effect and possibly the aim of encouraging participation in state-approved ERISA regulated plans while discouraging participation in unapproved ERISA regulated plans.

(2) California law is not saved from preemption by the ERISA "savings clause," 29 U.S.C. § 1144(d). While the Fitzgerald Act does provide for state approval of apprenticeship programs, it does not depend on state law for enforcement, does not mandate apprenticeship programs and does not seek to discourage other types of training programs. In the view of the Ninth Circuit, the Fitzgerald Act would not be impaired by the preemption of this California law.

The court denied the Petition for Rehearing and Suggestion for Rehearing En Banc on July 19, 1995, which was based in large part on this Court's then-recent decision as to which state laws "relate to" ERISA plans. *New York State Conference of Blue Cross and Blue Shield, et al. v. Travelers*, 115 S. Ct. 1671 (1995).

III. SUMMARY OF ARGUMENT

ERISA regulates the financial support of apprenticeship programs, but does not regulate the substantive implementation of apprenticeship programs.

Preemption of California's prevailing wage law, as it applies to apprentices, impairs the ability of the Secretary of Labor to implement and promote apprenticeship under the Fitzgerald Act and its regulations, and, therefore, is saved by ERISA's "savings clause".

The *Dillingham* decision will foster the establishment of sham apprenticeship programs that will not provide meaningful training for young people, minorities and women, and will seriously impact the ability of bona fide apprenticeship programs and legitimate contractors to compete for California's public works projects.

IV. ARGUMENT

A The Organizational Structure of Apprenticeship Training Programs Consists of Training Trust Funds that Financially Support the Apprenticeship Programs and are Regulated by ERISA and the Joint Apprenticeship Committees that Implement the Apprenticeship Regulations Promulgated Under the Fitzgerald Act.

Apprentice training trust funds are employee benefit plans within the meaning of 29 U.S.C. § 1002(1).

In *Massachusetts v. Morash*, 490 U.S. 107, 109 S. Ct. 1668 (1989), this Court set forth criteria to determine

whether a plan or program constitutes an employee welfare benefit plan within the meaning of Section 3(1) of ERISA. The Court found that:

" . . . [I]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds."¹

Id., 109 S. Ct. at 1673.

Apprentice training trust funds are required to report and disclose their financial status, their trustees have a fiduciary duty to ensure that employees' expectation of benefits will be met by proper management of the fund by the administrator of the trust fund.

The training programs developed and administered by apprenticeship committees are employment-related programs that should not be regulated by ERISA since there is no danger of mismanagement of the funds accumulated to finance the training programs.

Apprenticeship training has two basic components:

- (1) on the job training
- (2) classroom-related training.

¹ See, e.g., *Private Welfare and Pension Plan Legislation: Hearings on H. R. 1045 et al. Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 91st Cong., 1st and 2nd Sess. 470-472 (1970) (testimony of Secretary of Labor concerning mismanagement of pension and Welfare funds); 120 Cong. Rec. 4279-4280 (1974) (remarks of Rep. Brademas); *id.* at 4277-4278 (remarks of Sen. Perkins); 119 Cong. Rec. 30003 (1973) (remarks of Sen. Williams).

Both components are set forth in apprenticeship standards which are established by apprenticeship committees in conformance with uniform standards adopted by the State of California's California Apprenticeship Council ("CAC"). Ch. 4, Div. III, Cal. Lab. Code §§ 3070, *et seq.*; Code of Regs. Tit. 8, § 230 *et seq.*

On the Job Training ("OJT") is the component of the apprenticeship program in which the employer provides employment to the apprentices and journeymen supervision in providing the training component on the job. Under the terms of the collective bargaining agreement, the union and the employer have established an apprenticeship program which is administered by a joint apprenticeship committee ("JAC"). The programs' standards are adopted pursuant to the uniform standards established by the Fitzgerald Act, 29 U.S.C. § 50, and its regulations, and the California counterpart, the Shelley-Maloney Act, Cal. Labor Code § 3070, *et seq.*, and its regulations adopted by the California Apprenticeship Council.

In addition to the OJT component of an apprenticeship program, both the Fitzgerald Act and the Shelly-Maloney Act regulations require classroom-related training to assure that apprentices will have sufficient written and oral skills to graduate to journeyman status. Classroom-related training is performed in conjunction with local education agencies ("LEAs") which are, high schools, junior colleges and universities that have vocational programs. The joint effort between the JAC and the LEA is supplemented by both state and federal funds through various programs that support apprenticeship. At the federal level, there is the Perkins Act,

20 U.S.C. § 2301, and at the state level, the Montoya Act, Cal. Education Code § 8152 *et seq.*, which supplies funding to the JAC and LEA for those students who attend classroom-related training at the LEA's facility.

The OJT and classroom-related training requirements are set forth in the Fitzgerald Act regulations and have been adopted by the State of California through the partnership envisioned by Congress when the law was enacted.

When the Fitzgerald Act was enacted by Congress in 1937, the intent of the sponsors of the Act was to develop a cooperative program between the federal and state governments to promote apprenticeship and to provide standards that would protect the welfare of the apprentices. Over the last 60 years, the goals of the Fitzgerald Act have been supported by approximately 37 states that cooperated with the federal government in developing comprehensive programs for the development of apprenticeship training in all segments of industry.

When ERISA was enacted in 1974, and Congress determined that the Secretary of Labor should be responsible for implementing the law, Congress was clearly aware of the forty-year-old Fitzgerald Act that granted the Secretary of Labor authority to implement and foster apprenticeship training in partnership with the states.

Although ERISA includes plans for "apprenticeship and other training", it clearly must have been the intent of Congress to regulate the funding sources of the apprenticeship and training programs and to leave the regulation of apprenticeship to other state and federal regulatory schemes. Congress never intended ERISA to

regulate the delivery system of apprenticeship through on-the-job training and classroom-related training. There is no cause for concern that employees will not receive the financial benefits that have been promised by their employers through payment of trust fund contributions to employee welfare benefit plans.

B. CACA and FFC are Concerned that the Decision in *Dillingham* will Foster the Establishment of Sham Apprenticeship Programs that will Seriously Impact Bona Fide Apprenticeship Programs that have been Approved by the State of California.

The JACs that are members of CACA, train approximately 25,000 apprentices and spend millions of dollars per year providing training facilities with the most advanced equipment and college certified instructors; whereby, they are teaching young men and women to become journeymen. Such apprenticeship programs provide the opportunities to equip young people to compete for jobs. Moreover, apprenticeship programs in California have been in the forefront of providing opportunities to women and minorities to enter into occupations requiring advanced technical training.

Prior to 1990, apprenticeship programs in the construction were predominantly jointly administered labor and management programs registered and approved by the State of California. However, during the 1990s unilateral non-union programs were established and presented to the Division of Apprenticeship Standards ("DAS") for approval. After many years of litigation,

unilateral programs have been recognized by the State of California. Although there are still substantial differences between the JACs and the unilateral programs, there has been an effort in California between all of the apprenticeship programs to establish a level playing field where uniform standards would apply irrespective of the philosophical differences between the programs.

The California Apprenticeship Council in 1993 appointed a Blue Ribbon Committee of representatives from both labor and management, including non-union management, to develop standards that would apply to all apprenticeship programs in the State. For over three years this committee has worked diligently to overcome the differences between the union and the non-union programs, and develop uniform criteria with the sole goal of the welfare of the apprentices in the State of California.

The decision in *Dillingham* severely impacts the ability of the Blue Ribbon Committee to develop uniform standards for all apprenticeship programs. If the *Dillingham* decision stands as written, it will allow unscrupulous employers to establish "apprenticeship programs" in name only and employ workers on public works jobs, classify them as apprentices, but provide no on-the-job training, and no classroom-related training. These types of sham programs will significantly impact the ability of the existing apprenticeship programs to continue to attract and maintain apprentices since the employers using the sham programs will have a competitive advantage, through lower labor costs, over legitimate contractors who support the legitimate apprenticeship programs through contributions to training trust funds.

C. California's Prevailing Wage Requirements for Apprentices Registered in State Approved Programs are Areas of Traditional State Regulation of Minimum Labor Standards.

Congress in enacting the Davis-Bacon Act, 40 U.S.C. § 276a, and California in establishing its prevailing wage law, Cal. Labor Code § 3070, *et seq.*, clearly recognized the importance of establishing prevailing wages for public works construction. Since the Davis-Bacon Act was enacted some sixty years prior to ERISA, preemption of the State's ability to regulate apprenticeship programs and require that only registered apprentices in approved programs can be paid less than the journeyman rate on public works jobs would conflict with the legislative intent of the prevailing wage laws. The courts have acknowledged the right of states to regulate minimum labor standards. See *Metropolitan Life, supra*, 471 U.S. 724; *Fort Halifax, supra*, 482 U.S. 1.

Establishment of a prevailing wage for registered apprentices prevents the lowering of labor standards and provides a level playing field for all contractors. This guarantees the State qualified apprentices who will perform quality work on its projects.

D. ERISA Preemption Conflicts with the Fitzgerald Act and the Authority Granted to the Secretary of Labor to Enter Into Cooperative Agreements with States to Promote, Develop and Maintain Apprenticeship Programs, Therefore, California's Regulation of Apprenticeship Programs is Saved by ERISA's Savings Clause.

The registration and supervision of apprenticeship programs has been delegated, pursuant to the Fitzgerald Act, to approved state apprenticeship councils in California and other states. The Fitzgerald Act directs the Secretary of Labor to both promote the furtherance of labor standards to safeguard apprentices and to cooperate with states engaged in the regulation of apprenticeship.

The Secretary of Labor has the authority to review California State regulations for approving apprenticeship programs. If the Secretary of Labor's review process discloses that California statutes or regulations do not assist in the implementation of the objectives of the Fitzgerald Act, the Secretary of Labor pursuant to Title 29, Code of Federal Regulations sections 29.2 - 29.3, has the power to require the State to amend or repeal its regulations. The Secretary of Labor can also decertify California as a state meeting Fitzgerald Act apprenticeship requirements.

On February 24, 1986, an agreement entitled "State of California Cooperative Working Agreement for the Division of Apprenticeship Standards and Bureau of Apprenticeship Training" was signed by the Regional Director and the State Director of the U. S. Department of Labor, Bureau of Apprenticeship and Training, and the Chief of the State Department of Industrial Relations, Division of Apprenticeship Standards. The preamble states:

"The Bureau of Apprenticeship and Training and the Division of Apprenticeship Standards have a responsibility to work as complementary units to promote, develop and maintain both apprenticeship and other on-the-job training systems. This responsibility is necessary in order to carry out the provisions of Public Law 308 (Fitzgerald Act); the California Apprenticeship Law (Shelley-Maloney Apprentice Labor Standards Act of 1939, Chapter 4, Division 3, Labor Code of California); and Title 8, Chapter 2, California Administrative Code. Each agency shall maintain its own identity, but will perform similar work in a like manner to accomplish these objectives."

There also was established a committee known as the DAS-BAT State Coordination Committee, which consists of the Chief and the Deputy Chief, Division of Apprenticeship Standards, and the Regional and State Directors of the Bureau of Apprenticeship and Training. Among the functions of this committee is: (1) to "discuss and make recommendations on methods of improving and expanding apprenticeship and training in the State of California." *State of California Cooperative Working Agreement for the Division of Apprenticeship Standards and Bureau of Apprenticeship Training* (Comm., sub.6) (Feb. 24, 1986).

ERISA should not be allowed to preempt cooperative arrangements such as the DAS-BAT Agreements, since the Secretary of Labor is clearly authorized to enter into such arrangements.

ERISA's Savings Clause, 29 U.S.C. section 514(d) states:

"Nothing in this title shall be construed to alter, amend, modify, invalidate, *impair*, or supercede any law of the United States (except as provided in section 111 and 507(b) or any rule or regulation issued under any such law."

(emphasis added)

In *Joint Apprenticeship and Training Council of Local 363, International Brotherhood of Teamsters, AFL-CIO v. New York State Department of Labor, et al.*, No. 92 Civ. 1206 (S.D.N.Y., May 6, 1992) (LJF), a state approved apprenticeship program challenged the State of New York's authority to deregister the program for failure to comply with the state's rules and regulations concerning the training of apprentices. The District Court noted that the state's authority to regulate apprenticeship programs was derived from the Fitzgerald Act and its implementing regulations, and that New York's apprenticeship regulatory agency had been approved as a state apprenticeship council by the Department of Labor. The District Court held that the state's authority to regulate apprenticeship programs was saved from preemption by ERISA's savings clause.

In *Electrical Joint Apprenticeship Committee, et al. v. McDonald*, 949 F.2d 270 (9th Cir. 1991), the court held that state and federal apprenticeship administrative agencies could exercise authority to regulate apprenticeship programs under the Fitzgerald Act and its implementing regulations. *McDonald* held that ERISA does not preempt state laws providing for approval of apprenticeship programs if such laws are applying standards that are consistent with, and aid in, implementing the Fitzgerald Act and its regulations. There can be no question that the

comprehensive regulatory scheme developed by the State is consistent with the Fitzgerald Act and its regulations.

V. CONCLUSION

Congress never intended ERISA to preempt a state's traditional regulation of apprenticeship wages on state funded public works projects where the regulation is expressed in a state prevailing wage law that restricts contractors' payment of lower apprentice wages to apprentices registered in apprenticeship program approved by the state utilizing federal standards.

Respectfully submitted,

LAWRENCE H. KAY

*JAMES P. WATSON

STANTON, KAY & WATSON

7801 Folsom Boulevard, Suite 350
Sacramento, California 95826
(916) 381-7868

Counsel for Amici CACA and FFC

*Counsel of Record

June 14, 1996

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS
ENFORCEMENT, DIVISION OF APPRENTICESHIP
STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS;
COUNTY OF SONOMA,

Petitioners,
v.

DILLINGHAM CONSTRUCTION, N.A., INC.;
MANUEL J. ARCEO dba SOUND SYSTEMS MEDIA,
Respondents.

REPRINTED COPY

On a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AND THE BUILDING AND CONSTRUCTION TRADES
DEPARTMENT, AFL-CIO, AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

MARSHA S. BERZON
SCOTT A. KRONLAND
177 Post Street
San Francisco, CA 94108
DONALD J. CAPUANO
LOUIS P. MALONE
4748 Wisconsin Ave., N.W.
Washington, DC 20016

JONATHAN P. HIATT
815 16th Street, N.W.
Washington, D.C. 20006

LAURENCE J. COHEN
TERRY R. YELLIG
1125 15th Street, N.W.
Washington, DC 20005

LAURENCE GOLD
(Counsel of Record)
1000 Connecticut Ave., N.W.
Washington, DC 20036
(202) 833-9340

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**BRIEF OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AND THE BUILDING AND CONSTRUCTION TRADES
DEPARTMENT, AFL-CIO, AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 77 national and international unions with a total membership of approximately 13,000,000 working men and women, and the Building and Construction Trades Department of the AFL-CIO, representing more than 4,000,000 laborers and mechanics employed in the construction industry throughout the United States, file this brief *amici curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. The Employee Retirement Income Security Act's coverage provision, § 3(1), 29 U.S.C. 1002(1), brings within the statute a "plan, fund or program . . . for the purpose of providing . . . apprenticeship or other training programs." The Ninth Circuit determined that the program establishing the training and labor standards for apprentices is part of an "apprenticeship . . . program" and that this determination suffices to bring such programs within ERISA's coverage. The salient issue, however, actually is whether those training and labor standards are part of the "plan, fund or program" to *provide* an "apprenticeship . . . training program."

The language and structure of the ERISA coverage provision, when considered in light of the statutory objectives, the background against which Congress acted and the peculiar nature of apprenticeship programs as employee benefit programs, strongly suggest that ERISA was intended to cover *only* the fund, if any, created to defray the costs of apprenticeship training, and not the underlying complex of labor and training standards for running the program. The two sets of federal statutory policies in place before ERISA, one embodied in the Fitz-

gerald Act, 29 U.S.C. § 50, which provides for formal apprenticeship programs governing the labor and training standards of apprentices, and the other embodied in the Davis-Bacon Act, 40 U.S.C. § 276a(b), and § 302 of the Labor-Management Relations Act, 29 U.S.C. § 186, which govern the joint labor-management funds for financing such apprenticeship training programs, reflect and serve to perpetuate just such a basic distinction between “apprenticeship funding programs” and “apprenticeship training programs.” That dichotomy in turn forms the basis of, and is carried forward in, ERISA by providing for coverage of the funding programs and not the underlying training programs. *Infra*, pp. 3-17.

II. On the above analysis, the question then becomes whether, under ERISA § 514(a), the California statute providing that registered apprentices can be paid less than the prevailing wage for fully-qualified journey-persons “relates to” the apprenticeship fund covered by ERISA. The prevailing wage statute does not in any way mention or address any aspect of the funding arrangement, and the statutes and regulations governing the standards for registration of apprentices do not do so either.

The only conceivable impact of the California prevailing wage law apprenticeship provision upon ERISA-covered apprenticeship funds is that the law creates a purely economic, indirect inducement to employers to establish apprenticeship training plans meeting registration standards, and such training programs may cost more than lower-quality, unregistered programs. Under this Court’s opinion in *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, — U.S. —, 115 S. Ct. 1671 (1995) (“*Travelers*”), an indirect economic connection of this kind that “simply bears on the costs” faced by an ERISA plan is insufficient to trigger ERISA preemption. *Infra*, pp. 17-26.

Moreover, even if one were to entertain the Ninth Circuit’s erroneous view and assume that ERISA covers apprenticeship training programs as well as apprentice-

ship funding programs, *Travelers* still indicates that there is not a sufficient relationship between the California prevailing wage law apprenticeship provision and apprenticeship plans to come within ERISA § 514(a) as construed in *Travelers*. *Infra*, pp. 26-30.

ARGUMENT

I. ERISA Preempts State Laws That Relate To Plans, Funds Or Programs For The Financing Of Apprenticeship Training Programs, And Not State Laws That Relate To The Underlying Training Programs Themselves.

A. ERISA § 514(a), 29 U.S.C. § 1144(a), provides that, with enumerated exceptions, ERISA preempts state laws “insofar as they may . . . relate to any employee benefit plan” within the statute’s meaning. Thus, before determining whether a state law “relates to” an employee benefit plan, a court must determine what ERISA means by an “employee benefit plan.”

The District Court and the Ninth Circuit did consider and pass upon this point in this case as a necessary part of their preemption analysis. Pet. App. 10-11, 32-33. But the pertinent statutory language—read in light of ERISA’s object and policy—yields a quite different conclusion than that reached by the courts below.

As we demonstrate, an ERISA “employee benefit plan” regarding apprenticeship is the program for providing funding for an apprenticeship training program—which we will call, for convenience, the “apprenticeship funding program.” It is *not*, as the Ninth Circuit presumed, the program for providing apprentices with the classroom and on-the-job training that enables them to become skilled journeypersons—which we will call, for convenience, the “apprenticeship training program.” The distinction between these two programs is thus of great significance in applying ERISA’s preemption provision.

B. We begin with the applicable statutory language. Under ERISA, there are two types of “employee benefit plans”—“employee pension benefit plans” and, of per-

tinence in the case of apprenticeship, "employee welfare benefit plans." ERISA § 3(3), 29 U.S.C. § 1002(3). ERISA § 3(1)(A), 29 U.S.C. § 1002(1)(A), defines an "employee welfare benefit plan" to include

any plan, fund or program . . . established or maintained by an employer or by an employee organization, or by both . . . for the purpose of providing for its participants or their beneficiaries . . . [inter alia] . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, . . . vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services [emphasis supplied]

The Ninth Circuit concluded, not surprisingly, that the program at issue in this case is "an 'apprenticeship or other training program' within the meaning of [§ 3(1)(A)]." Pet. App. 10. And then, on the basis of that conclusion standing alone, the court below reached its ultimate conclusion that the apprenticeship plan here viewed broadly is in all its facets a single, overall ERISA-covered "employee welfare benefit plan." Pet. App. 10-11.

But the complete coverage question is *not* what Congress meant by the phrase "apprenticeship or other training program." Rather, by the terms of the statute, it is what Congress meant by the phrase "[a] plan, fund or program . . . for the purpose of providing . . . [an] apprenticeship or other training program[.]" The structure and wording of this complete phrase indicate that the drafters had in mind a system of two interrelated programs—the first of which "provides" for the second. Thus, on the face of the matter, the Ninth Circuit's conflation of the two programs into one does not appear to be a fair and accurate reading of all of the statutory words.

C. This Court's decision in *Massachusetts v. Morash*, 490 U.S. 107 (1989), makes clear that the language of the ERISA coverage provision cannot be considered in a vacuum in determining what constitutes a covered ERISA "plan, fund or program." The issue in *Morash*

was whether "a company's policy of paying its discharged employees for their unused vacation time constitutes an 'employee welfare benefit plan' within the meaning of § (3)(1)" of ERISA. *Id.* at 109.

The *Morash* Court acknowledged that "[t]he words 'any plan, fund, or program . . . maintained for the purpose of providing . . . vacation benefits' may surely be read to encompass any form of regular vacation payments to an employee." 490 U.S. at 114. The Court rejected that reading of the coverage provision, however, because "[i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds." *Id.* at 115. Where the danger of mismanagement of accumulated funds is not present, the Court found it unlikely that Congress intended to subject employment-related programs to ERISA regulations. *Id.* at 115-16.¹

The *Morash* Court recognized as well that the "States have traditionally regulated the payment of wages" and related aspects of compensation, and that including such compensation within the coverage of ERISA would displace state regulation in the area, with the result that "employees would actually receive less protection." 490 U.S. at 119. Where that would be the case, the Court concluded, courts should be "reluctant to so significantly interfere with the separate spheres of governmental authority preserved in our federalist system." *Id.* (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987)).

D. The Secretary of Labor has for similar reasons recognized in regulations interpreting the ERISA coverage

¹ The *Morash* Court noted that "The reference[s] . . . in § 3(1) should be understood to include within the scope of ERISA those . . . benefit funds, analogous to other welfare benefits, in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk." 490 U.S. at 115-16.

provision that not all "apprenticeship or other training programs" are covered by ERISA. Under these regulations, ERISA does not cover employer on-the-job training "plans" or "programs" that provide that the employee undergoing the training will receive compensation akin to wages. See 29 C.F.R. § 2510.3-1(b)(3)(iv) (excluding "[p]ayment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training"). As the Secretary explained in proposing that exclusion, "[a]lthough section 3(1) of [ERISA] can be read to include job-skill training within the term 'welfare plan,' such training is virtually inseparable from an employee's normal duties for which compensation is paid, and therefore is not treated as an employee benefit plan." 40 Fed. Reg. 24,643 (1975). Although such employee training *could* be construed to fall within ERISA's coverage provision, because it involves a benefit provided to employees pursuant to what could be called a "program", these programs offer nothing for ERISA to regulate. Simply stated, the training plan involves neither the accumulation of funds nor the administration of accumulated funds.

The Secretary also has recognized in his regulations that, even where an apprenticeship *funding* program exists, apprenticeship is still unique among the ERISA "employee welfare benefit plan" class in its structure. In excepting "plans" to provide for apprenticeship from the ordinary ERISA reporting requirements, the Secretary explained:

Apprenticeship plans do not have participants in the same sense as typical welfare plans. The journeymen in a trade with an apprenticeship plan do not receive training or any other direct benefit from the apprenticeship program. Their only interest is a general one of preserving existing trade skills and practices. Thus, the journeymen are not participants in the conventional sense. . . . The apprentices who do receive training are a much smaller group, which changes in composition continuously as new apprentices join and others either drop out or graduate to

journeymen status. [40 Fed. Reg. 24642, 24647 (June 9, 1975), proposing 29 C.F.R. § 2520; see also 40 Fed. Reg. 34526, 34529-30 (August 15, 1975).]

In other words, apprenticeship plans (in their broad sense) do not involve "normal" participants since an employers' existing journeyperson employees, the contributors to the funding program, will not receive any apprenticeship training and have no right to receipt of apprenticeship fringe benefits on the occurrence of some contingency. Nor do apprenticeship plans involve "normal" beneficiaries since an apprentice may receive training without having been an employee participating in the plan or the beneficiary of a specific participant (such as an heir).

E. With *Morash's* lessons and the Secretary of Labor's apprenticeship regulations in mind, we turn to the background against which Congress legislated when it adopted ERISA in 1974. As we show, by that time Congress had long recognized the distinction between what we have labeled "apprenticeship funding programs" and "apprenticeship training programs." In fact, development of the distinction was in large part the *result of federal policy*.

(1.) *Apprenticeship training.* Federal involvement in promoting apprenticeship training programs began in 1934, when Executive Order No. 6750-C created the Federal Committee on Apprenticeship to work with representatives of labor, management and the states to set voluntary apprenticeship labor standards. Then, as a next step, the 1937 Congress adopted the Fitzgerald Act, 29 U.S.C. § 50, to provide express statutory authorization for such standard-setting work. H.R. Rep. No. 945, 75th Cong., 1st Sess. 2-3 (1937).

The Fitzgerald Act is entitled "An Act to enable the Department of Labor to formulate and promote the furtherance of *labor standards* necessary to safeguard the welfare of apprentices and to *cooperate* with the States in the promotion of such standards." 50 Stat. 664 (1937)

(emphasis supplied). The Act thus directs the Secretary of Labor to "formulate and promote the furtherance of *labor standards*" for apprenticeship and "to cooperate with State agencies engaged in the formulation of and promotion of *standards* of apprenticeship" 29 U.S.C. § 50 (emphasis supplied).

Among the first tasks for the Secretary of Labor's newly authorized federal Apprenticeship Unit was "to obtain state legislation enabling state departments of labor to develop apprentice labor policies and standards." U.S. Dept. of Labor, Manpower Administration, Handbook of Bureau of Apprenticeship and Training, sec. II, at 25 (1974) ("1974 Handbook"). The new federal agency developed and distributed a model state statute for this purpose (U.S. Dept. of Labor, Federal Committee on Apprenticeship, Suggested Language for a State Apprenticeship Law (1937), *reprinted in* 1 Grace Abbott, *The Child and the State*, 251 (1938)), and by 1974 more than half the states had adopted apprenticeship laws (1974 Handbook, sec. II, at 25).

Pursuant to the Fitzgerald Act, the Secretary of Labor also has promulgated regulations setting forth criteria for defining apprenticeable occupations and minimum standards governing apprenticeship training. The regulations, codified at 29 C.F.R. §§ 29.1-29.13, encourage the development by employers and labor organizations of apprenticeship training programs, and establish a procedure by which programs meeting minimum federal standards may be approved by the Bureau of Apprenticeship Training as eligible for federal assistance and certification and for other federal purposes. The federal regulations also enlist the states in the promotion of apprenticeship training by providing for the approval by the Secretary of Labor of state apprenticeship councils ("SACS") in states that have adopted apprenticeship laws and regulations meeting the federal minimum requirements. The regulations delegate to an approved SAC the responsibility for certifying local apprenticeship programs.

The Fitzgerald Act and its implementing regulations do not address how apprenticeship programs are financed or the manner in which such a financing scheme would be administered. Rather, that Act and those regulations require, as a condition of registration, that the apprenticeship program be conducted pursuant to "an organized, *written plan* embodying the terms and conditions of [the apprentice's] *employment, training, and supervision*." 29 C.F.R. § 29.5(a) (emphasis supplied).

These written plans, submitted for approval to the federal government or an approved state apprenticeship council, embody the "apprenticeship training programs" in existence today. See 29 C.F.R. § 29.2(e) (defining an "apprenticeship program" as "a *plan* containing all terms and conditions *for the qualification, recruitment, selection, employment and training of apprentices*" (emphasis supplied)); 8 Cal. Code Regs. § 205(e), (f) (defining an "apprenticeship program" as a "plan" covering such matters). These programs are administered by "apprenticeship committees" which are "established to conduct, operate, or administer, an apprenticeship program and enter into apprenticeship agreements with apprentices." 29 C.F.R. § 29.2(i). Under the Fitzgerald Act regulations, these committees may be "joint" (comprising an equal number of employer and union representatives) or "unilateral" (comprising only a "program sponsor"). *Id.*

(2.) *Apprenticeship Funding*: Congress first addressed in 1959 the separate issue of how apprenticeship training programs are funded. Because of the intermittent nature of employment in the construction industry, many fringe benefits are provided to union workers by jointly managed labor-management trust funds to which employers contribute. At first, "area-wide apprenticeship and training programs were financed by informal arrangements for contributions from either employers or a labor organization, or from both groups." U.S. Dept. of Labor, *JATC Handbook: A Guide to Joint Management-Labor Area-*

Wide Apprenticeship and Training Committees, 14 (1963). But it was only a matter of time before formal trust funds were set up to fund apprenticeship training programs as well. *Id.*

As is common in human affairs, this innovation raised a second generation of legal questions—in this instance questions concerning the legality of these joint trust funds under § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186. *See, e.g.*, Comment, Payments to Joint Labor-Management Boards Under LMRA section 302, 10 Stan. L. Rev. 374 (1958). As the President of the AFL-CIO's Building Trades Department told Congress:

The issue has arisen because of the language of section 302 of the Taft-Hartley Act. Subsections (a) and (b) of this section make it unlawful for an employer to pay, or any representative of employees . . . to receive any money or other thing of value. . . . Subsection (c)(5) of this section authorizes exceptions for joint trust funds but the purposes of such valid joint trust funds are limited to the specific items prescribed in such subsection. . . . Apprenticeship or other training programs are not included in the specification of valid purposes. . . .

Certainly the Congress could not have intended to establish a policy of prohibiting employer contributions to joint trust funds for apprenticeship or other training programs. It is, indeed, the policy of the Federal Government to promote apprenticeship programs and particularly in the building and construction trades. [Hearings Before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, on Labor-Management Reform Legislation, 86th Cong., 1st Sess., Part 4, at 1733 (1959) (statement of Richard J. Gray, President, Building and Construction Trades Department, AFL-CIO).]²

² Congress had already been advised that the "proper carrying out of the training functions of a joint apprenticeship committee requires funds for the payment of salaries of instructors and other costs of administration and instruction. These funds are provided

Secretary of Labor James P. Mitchell supported the call for an LMRA § 302 amendment to clarify the legality of jointly-administered training trust funds, stating that the Labor Department had been responsible for developing joint national training programs in all the major building trades, that "[f]or the most part, the funds necessary for carrying out these programs are provided by employer contributions to trust funds," and that "the cloud of illegality over employer contributions to these funds will handicap this important program." 1958 Hearings at 119-120 (Letter from Secretary of Labor James P. Mitchell).

The 1959 Congress responded by amending LMRA § 302(c) to make clear the legality of trust funds to finance apprenticeship training programs, *so long as certain standards are followed with respect to fund administration*. *See* Pub. L. No. 86-257, § 505, 73 Stat. 519, 537-38 (1959). This amendment took the form of an exception to LMRA § 302's general ban on the payment by an employer of anything of value to a representative of its employees, for "money . . . paid by any employer to a trust fund established by such representative for the purpose of . . . defraying the costs of apprenticeship or other training programs" so long as *inter alia*, "the detailed basis on which such payments are to be made is specified in a written agreement" and there are "provisions for an annual audit of the trust fund. . . ." 29 U.S.C. § 186(c)(6) (emphasis supplied).

Thus, labor-management apprenticeship *trust funds* were recognized and brought under a federal regulatory regime separate from the cooperative federal-state regime the Fitzgerald Act establishes for apprenticeship training programs (described *supra*, pp. 7-9). And, the concern

in most instances by employer contributions to trust funds" Hearings Before the Subcommittee on Labor and Public Welfare, U.S. Senate, Hearings on Union Financial and Administrative Practices, 85th Cong. 2d Sess. 18 (1958) (hereinafter "1958 Hearings").

of § 302(c) is with the holding and managing of the trust fund moneys, not with the underlying program for training apprentices or with the separate apprenticeship committee that, under the Fitzgerald Act, establishes and administers that program.³

Six years later, the 1964 Congress amended the Davis-Bacon Act, which sets minimum wage rates for workers on most federal construction projects, to include certain fringe benefits within the definition of the "prevailing wage." See Pub. L. No. 88-349, § 1, 78 Stat. 238 (1964) (codified at 40 U.S.C. § 276a(b)). Among these benefits are contributions "irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program . . . for defraying costs of apprenticeship or other similar programs." 40 U.S.C. § 276a(b) (emphasis supplied). The term "fund, plan, or program" in the Davis-Bacon Act amendment was derived from § 3(a) of the Welfare and Pension Plans Disclosure Act ("WPPDA") (Pub. L. No. 85-836, 72 Stat. 997 (1958)), the predecessor federal statute to ERISA with respect to the regulation of welfare and pension plans. See S. Rep. No. 963, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2339, 2344 (explaining derivation); see also 29 Fed. Reg. 13466 (Sept. 30, 1964) (adopting 29 C.F.R. § 5.27) ("The phrase 'fund, plan, or program' [in the Davis-Bacon Act] is merely intended to recognize the various types of arrangement commonly used to provide fringe benefits through employer contributions. The phrase is identical to language contained in section 3(1) of the [WPPDA].")⁴

³ Both LMRA § 302(c) and the Fitzgerald Act regulations refer to the requirement of a "written agreement." The § 302(c) agreement concerns the basis on which contributions will be made to a trust fund; the Fitzgerald Act agreement is between an apprentice and an apprenticeship committee. 29 C.F.R. § 29.2(j). Again, this distinction indicates that there are two statutory schemes each addressed to different aspects of apprenticeship.

⁴ The WPPDA did not itself cover any aspect of apprenticeship.

(3.) *The Practice.* The creation of formal apprenticeship funding programs, separate from apprenticeship training programs, had become the norm by 1974, when ERISA was adopted, and this structure continues as standard practice today. The Bureau of Apprenticeship and Training encouraged this structure, advising apprenticeship committees that the use of training trust funds to defray the costs of a training program is lawful, of the purposes for which such funds may be used, and of standard trust fund agreements developed by national employer groups and labor organizations in the building trades. See U.S. Dept. of Labor, *JATC Handbook: A Guide to Joint Management-Labor Area-Wide Apprenticeship and Training Committees*, supra, at 14.

These forms developed on a national level have served as the model for local structures. Typical examples are the Local Apprenticeship and Training Standards for the Electrical Contracting Industry and the Electrical Joint Apprenticeship and Training Trust Fund Agreement, two standard forms prepared by the International Brotherhood of Electrical Workers and the National Electrical Contractors Association, which provide for a Joint Apprenticeship Committee to run the training program (selecting apprentices, supervising instruction, and insuring that labor standards are met) and for the formation of a funding program to defray the costs of training through a labor-management trust administered by trustees. Such a trust fund often provides financing to several separately registered apprenticeship programs, each governed by an apprenticeship committee whose members may or may not serve as trustees of the fund. This model is then carried through to the local collective bargaining agreements, which provide for the selection of an apprenticeship committee and, separately, for the creation of a training trust to be managed by trustees.⁵

⁵ Copies of the IBEW/NECA forms and of several local IBEW collective bargaining agreements are being separately lodged with the Clerk of the Court.

The adoption of ERISA has served to further cement this dual structure. For example, in Advisory Opinion Letter 81-21A, the Department of Labor responded to a request for advice from a joint training trust fund (the "trust") and a separate joint apprenticeship committee (the "committee") set up by a collective bargaining agreement between a local union and employers. Although this joint trust was funded by contributions from employers for apprenticeship training, the trustees then fulfilled their obligation by transferring the funds to the control of the committee. The Department's advice was that this practice violated ERISA § 403(a)'s requirement that benefit plan assets be held in trust by trustees. At the same time, the Department approved of a proposal to remedy the problem which left the Committee in place but "removed from the Committee all responsibility for the investment, handling, and use of the funds" and placed "[a]ll responsibility over financial matters . . . in the hands of the trustees of the Trust." Advisory Opinion Letter 81-21A, U.S. Dept. of Labor, Labor-Management Service Administration, February 9, 1981.

(4.) *The Upshot.* The background against which Congress legislated strongly suggests that Congress adopted the two-tier structure of referring to a "plan, fund or program . . . for the purpose of providing for . . . apprenticeship . . . training programs," rather than simply a "plan, fund or program for the purpose of providing for apprenticeship," to express its intent that the "plan, fund or program" covered by ERISA is the "apprenticeship funding program" that is the subject of LMRA § 302(c) and the Davis-Bacon Act amendments, and *not* the underlying "apprenticeship training program" that is the subject of the Fitzgerald Act.⁶

⁶ Congress could not, without drastically changing the structural parallelism of the ERISA coverage provision, have referred to a plan to "defray the costs of apprenticeship," as it did in the 1959 amendments to LMRA § 302 and in the 1964 amendments to the Davis-Bacon Act. An ERISA § 3(1) plan is one that "provid[es]

First, ERISA § 3(1)(A)'s two-tier syntax obviously embodies a considered choice of words, as *none* of the other listed schemes is described as a "program." Moreover, the words chosen employ the very same, repetitive syntax previously employed in the Davis-Bacon amendments, which refer to a "fund, plan or *program . . . for defraying costs of apprenticeship or other similar programs*" (emphasis supplied). In that context, it is clear, as discussed above, that the "fund, plan or program" encompasses funding mechanisms, while the second reference to "programs" encompasses the substance of the training and labor standards for apprentices.

Indeed, in the ERISA coverage provision, Congress as a general matter purposefully drew lines between (i) a "plan, fund or program" to provide one of the enumerated ERISA welfare benefit programs and (ii) the program provided, where that program does not involve the payment of financial benefits to individuals.

Thus, ERISA covers a "plan, fund or program" to provide for "daycare centers," and Congress surely did not intend to federalize the actual operations of daycare centers, such as the ratio of children to caregivers. ERISA also covers a "plan, fund or program" to provide for "pre-paid legal services," and Congress surely did not intend to federalize the actual delivery of such services. In fact, ERISA's legislative history includes a colloquy explaining that states would retain their traditional role in licensing and disciplining attorneys. 3 Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, Legislative History of the Employee Retirement Income Security Act of 1974, at 4789-90 (Senators Taft and Javits).

ERISA § 3(1)(B) further provides that a plan providing "any benefit described in [LMRA § 302]" is covered by ERISA. And LMRA § 302(c)(6), as we have

for its participants or their beneficiaries" one of the listed schemes. "Defray the costs of apprenticeship" is not a noun, and would not fit into the list grammatically.

seen, includes "a trust fund . . . established . . . for the purpose of defraying the costs of apprenticeship or other training programs." Again the reference is to the "apprenticeship *funding* program," not the "apprenticeship *training* program."

Second, the analysis in *Massachusetts v. Morash* of Congress' object in crafting ERISA's coverage provision reinforces what the statutory language read against its background so strongly suggests. By contrast to the "apprenticeship *funding* program," the matters properly understood to be part of the "apprenticeship training program" simply "present none of the risks that ERISA was intended to address." *Morash*, 490 U.S. at 115. The latter generates *no* concern with the "mismanagement of funds accumulated to finance employee benefits . . ." and *no* "contingency" that will determine whether participants receive benefits (as the participant journeyman employees will not be receiving apprenticeship training). *Id.*

It is also to the point that—as was the case with the vacation pay at issue in *Morash*—the registration of apprenticeship *training* programs to ensure their ongoing integrity had long been the traditional province of the states when Congress enacted ERISA in 1974. Indeed, continued state involvement in this area was largely due to *federal* policy following the adoption of the Fitzgerald Act. That Congress *sub silentio* reversed nearly 40 years of federal apprenticeship policy, by which the states were enlisted to register and supervise "apprenticeship training programs" as part of an exercise of cooperative federalism—a policy that to our knowledge generated not a single complaint during the extensive hearings that preceded ERISA—is beyond reason.

Third, the distinction between "apprenticeship funding programs" and "apprenticeship training programs" also finds support in the Department of Labor's regulations, discussed above, interpreting ERISA's coverage provision to exclude "plans" or "programs" that provide for compensation to employees undergoing on-the-job training akin to wages. An employer could easily run an "ap-

prenticeship training program," like any other training program, on an *ad hoc* basis, financing it from general assets. That apprenticeship often involves a separate apprenticeship funding program as well surely brings that *funding* program within ERISA's coverage. But the *training* program, consisting of on-the-job training with compensation paid for by the individual employer, and a curriculum of related classes, still contains nothing for ERISA to regulate. Nor does reading the ERISA coverage provision as directed to the funding program leave unaddressed any of the risks ERISA was intended to cabin. To the extent an apprenticeship committee actually becomes involved with financial matters, such as the making of spending decisions, committee members indubitably become ERISA fiduciaries, subject to the legal duties, and the enforcement provisions, created by ERISA. See ERISA § 3(21); 29 U.S.C. § 1002(21) (specifying who is a "fiduciary").

In sum, the obvious line to draw for ERISA coverage purposes between the "plan, fund, or program . . . for the purpose of providing for . . . apprenticeship . . . training programs" and what the "plan, fund or program" is providing was well developed by 1974, and fits not just the statutory language but also what the ERISA Congress intended to regulate and did *not* intend to regulate. As we have explained, that line is the one between the "apprenticeship funding program" which is covered by ERISA, and the "apprenticeship training program" which is not.

II. California's Prevailing Wage Law Does Not, Within The Meaning Of ERISA, "Relate To" A Plan, Fund Or Program For The Purpose Of Providing Apprenticeship Programs

A. That ERISA covers only apprenticeship funding programs, and not apprenticeship training programs, greatly simplifies but does not entirely decide this case. The question remains whether the state law here in question "relates to" ERISA-covered apprenticeship funding

programs within the meaning of the ERISA preemption provision, § 514(a), 29 U.S.C. § 1144(a).

California Labor Code § 1777.5 provides, *inter alia*, that registration of apprentices in state-approved apprenticeship programs authorizes employers performing public works contracts covered by the California prevailing wage law to pay such apprentices less than the "prevailing rate of per diem wages" otherwise required by that California law. On the other hand, apprentices not enrolled in programs approved by the State who are employed on state public works projects must be paid that "prevailing rate of per diem wages."⁷

The state approval of apprenticeship programs, in turn, depends upon meeting broadly stated "[a]pprenticeship program standards" (Cal. Code of Regs., Title 8, § 212 ("§ 212")), which generally track the federal "[s]tandards of apprenticeship" promulgated pursuant to the Fitzgerald Act (29 C.F.R. § 29.5). Both sets of standards treat *exclusively* with such matters going to the substance of apprenticeship training as the term of apprenticeship, the work processes taught on the job, the organized supplemental instruction offered, the manner in which apprentices' wages are set, evaluation of the apprentice's progress, the numeric ratio of apprentices to journey-persons consistent with adequate training as well as the qualifications of the individuals providing on-the-job supervision, the probationary period for apprentices, the adequacy of equipment and materials, the qualifications for enrollment as an apprentice, the contents of the written apprenticeship agreement, provision for discipline of

⁷ Throughout this section, we term the provisions of Cal. Labor Code § 1777.5 establishing special provisions governing the wages paid to registered apprentices—that is, the first three paragraphs of § 1777.5—the "prevailing wage law apprenticeship provision," so as to distinguish those paragraphs from the remainder of § 1777.5, dealing with entirely separate apprenticeship-related requirements for public works contractors. Section 1777.5 does not directly set a wage for apprentices, but does so by reference to the "regulations of the craft or trade at which he or she is employed."

apprentices, and the awarding of certificates of completion to apprentices. *Id.* Those standards do not specify the means, method, or amount of financing of any aspect of the program, but do of course assume overall adequate financing to provide the various required components of apprenticeship training at an acceptable level.

B. (1) ERISA § 514(a), as we noted at the outset, provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a)." And, literally speaking, a state prevailing wage law that treats separately with wages to be paid registered apprentices can be said to "relate to" the apprenticeship training programs in which those apprentices are registered. At the next remove, such a state prevailing wage law can also be said to "relate to" the apprenticeship funding program, if any, that provides financial support for the apprenticeship training program, both because having a training program necessarily implies financing it, and because the applicable labor standards may have an impact on the amount of financing required.

To say that much is, most emphatically, *not* to say that § 514(a) is *properly* read so that this attenuated string of connections is sufficient to void a state law that on its face has nothing whatever to do with the funding of apprenticeship training programs. As the Court was at pains to remind us just last year "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course for '[r]eally, universally, relations stop nowhere.'" *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, — U.S. —, 115 S. Ct. 1671, 1677 (1995) ("*Travelers*"). Here, the gossamer thread of connection from (i) non-mandatory state minimum wage-setting for employers who voluntarily undertake state projects, to (ii) registered apprentice status, on into (iii) the apprenticeship training program underlying that registration, and then to (iv)

the funding program, if any, that finances certain aspects of that training program illustrates well that "really, universally, relations stop nowhere."

Travelers holds that in light of this indeterminacy and to give effect to the terms of limitations contained in § 514(a) itself, the term "relate to" cannot be applied with "uncritical literalism." 115 S. Ct. at 1677. And, as we now show, under the method of analysis *Travelers* mandates, it is clear the minimal relationship between the funding mechanism used to defray the costs of certain aspects of apprenticeship training programs and the California prevailing wage law apprenticeship provision is even weaker than the relationship held insufficient to trigger ERISA preemption in *Travelers*, and cannot support the preemption conclusion reached below.

(2) This Court has frequently observed, and *Travelers* reiterated, that in determining the preemptive effect of federal law, the ultimate touchstone is congressional intent. 115 S. Ct. at 1676-77. And, in ascertaining that intent, the Court begins "with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The California prevailing wage law apprenticeship provision, more obviously than the health care rate-setting statute at issue in *Travelers*, falls within not one but several areas of traditional state regulation that the Court must presume that Congress did not intend to pre-empt, including, among other areas, regulation of wages, of public works projects, and of apprenticeship.

For example, as the Court observed in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)

"States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few

examples." [*Id.* at 756 (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)) (emphasis supplied).]

The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects. *Lusardi Construction Co. v. Aubry*, 1 Cal. 4th 976, 985, 824 P.2d 643, 648 (1992) (citing *O.G. Sansone Co. v. Department of Transportation*, 55 Cal. App. 3d 434, 458 (1976)). Accordingly, the authority exercised by the State in setting a prevailing wage and then preserving its efficacy by carefully limiting any exceptions thereto—including most importantly, the exception recognizing apprenticeship wages—is an integral part of the statutory "police power to regulate the employment relationship."

Further, as this Court has had occasion to remark, the state's interest in making employment-related determinations affecting private employers is at its height with regard to state contractors, since the employees of such contractors "in a substantial if informal sense, [are] working for the [government]." *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 211 n.7 (1983). For that reason, long before ERISA was enacted, the Court in *Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903), upheld the Kansas Eight Hour Law, the precursor of modern state prevailing wage laws.⁸

The third area of traditional state regulation affected by the California prevailing wage law apprenticeship statute is, of course, the area of apprenticeship training standards. *See supra*, pp. 7-9. As to the setting of such apprenticeship standards and the registration of apprentices under those standards, moreover, the general presumption against preemption of areas of traditional state authority is augmented by the general admonition stated in ERISA itself that that statute is not to be "con-

⁸ As the *Atkin* Court stated, "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." 191 U.S. at 223.

strued to alter, amend, modify, invalidate, impair or supersede any law of the United States." § 514(d), 29 U.S.C. § 1144(d) (emphasis supplied). As a rule of construction, § 514(d) instructs that, given the role ascribed to the states in formulating and implementing apprenticeship training and labor standards under the Fitzgerald Act and its implementing regulations, any construction of the preemption provision should avoid disturbing those state activities.

It is also very much to the point that wages, state contracting practices and apprenticeship labor standards are all matters that, in their entirety, Congress chose *not* to regulate in ERISA, and chose to leave to the state processes in effect at the time ERISA was enacted. And, the California prevailing wage law apprenticeship provision embodies California's judgment on the proper treatment of these three non-ERISA-regulated matters and does so in a manner that does *not* address in any respect the scheme used for providing financial support to any aspect of an apprenticeship training program.

(3) At the same time, the logic of the situation suggests that the California prevailing wage law apprenticeship provision can have radiating, though indirect, effects on an ERISA funding program that supports an apprenticeship training program.

The limitation of a lower wage on prevailing wage jobs to *registered* apprentices does provide economic inducement to the subset of employers who work on such jobs to provide job opportunities for registered apprentices, rather than for apprentices not participating in a registered program.

That inducement, in turn, may lead such an employer to establish apprenticeship training programs meeting the registration standards (rather than simply hiring apprentices registered in training programs established by other employers, which is theoretically possible but may be difficult or undesirable).

And, an employer who, by reason of that inducement and other considerations, does choose to establish or sup-

port a registered apprentice training program may decide to participate in a multiemployer fund, covered by ERISA rather than to proceed through an unfunded program not covered by ERISA.⁹

Finally, registered apprenticeship programs will normally entail higher costs than unregistered programs, since the point of the registration system is to assure quality training and fair treatment of apprentices. That means that ERISA apprenticeship funds that support registered apprenticeship training programs will normally require more in employer contributions than funds that support unregistered programs. That potential financial consequence of the California prevailing wage law apprenticeship provision comes as close to a traceable, albeit exceedingly indirect, effect on ERISA apprenticeship funds by reason of the California law as can be found.

Not only is that single potential economic effect attenuated but there is no suggestion that the statutory scheme was *designed* to influence apprenticeship fund decisions at all. Nor is there any aspect of prevailing wage law apprenticeship provision or the registration system upon which it depends that dictates to the fund trustees any particular expenditures in support of an apprenticeship training program, or controls the choices made by the trustees in determining how much money to raise, from whom to raise it, or how to disperse it.¹⁰

⁹ This choice is unlikely to be influenced by the need to meet registration standards in order to pay a lower apprenticeship wage; rather, it is the economic structure of industries such as construction, in which jobs with any one employer are temporary and in which employers typically band together to finance fringe benefits, that is the determinant.

¹⁰ There is no federal or state requirement that any ERISA fund, as opposed to individual employers or some governmental entity, pay for the apprenticeship training required in registered programs, or that an ERISA fund that finances some aspects of an apprenticeship training program finance all aspects of it. Consequently, the registration requirements do not dictate any particular expenditure or category of expenditures by an ERISA fund.

As such, the state and federal apprentice training program registration system that underlies the California prevailing wage law apprenticeship provision bears the same entirely indirect, purely economic relationship to ERISA funds as a myriad of other state laws that also affect the cost of the services the ERISA fund supports—including, for example, statutes affecting the salaries that must be paid to administrators who are hired, laws affecting the cost of leasing or buying real property and equipment for use in the apprenticeship training program's educational effort, and health, safety and environmental laws that affect the cost of providing that training.

(4) This ephemeral, economic impact is analogous to, but much weaker than, the indirect economic impact held *insufficient* in *Travelers* to provide the basis for displacing state authority.

Travelers concerned a New York statute providing that patients were charged for the average cost of treating the patient's medical problem, and were then charged additionally depending upon the type of insurance, or other financial arrangements for providing medical coverage, that paid the patient's hospital bill. 115 S. Ct. at 1674.

The *Travelers* provision did not impose any legal requirement on the sponsors or fiduciaries of ERISA health benefit plans to take, or not to take, any particular actions. Rather, the only impact of the New York scheme on ERISA plans was economic: Under the scheme, ERISA plans faced a different set of economic possibilities and incentives than the plans would have faced in an unregulated or differently regulated market. 115 S. Ct. at 1679-80.

In particular, because of the New York regulation of hospital charges—which had the purpose of encouraging health care purchasers, and ERISA health plans in particular, to use state-favored health coverage systems—ERISA plan trustees faced higher costs for some kinds of financial coverage of inpatient hospital services provided

to ERISA plan beneficiaries than the trustees would have faced in a pure free market for hospital cost coverage. See 115 S. Ct. at 1674.¹¹

The *Travelers* Court recognized that the scope of ERISA's preemption provision may include state laws other than those that deal specifically with the subject matter covered by ERISA. But laws operating as an indirect source of merely economic influence on the administrative decisions of ERISA plans "are a far cry from those 'conflicting directives' from which Congress meant to insulate ERISA plans" and, as *Travelers* holds, do not suffice to trigger preemption. 115 S. Ct. at 1680. *Travelers* stressed in this regard that the New York law did not

preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one. It simply bears on . . . costs . . . [T]o read the preemption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans . . . would effectively read the limiting language in § 514(a) out of the statute, a conclusion that would violate basic principles of statutory interpretation . . . [115 S. Ct. at 1679].

So here: With or without the state regulation at issue, ERISA funds in California continue to be free to structure themselves in any manner they deem desirable within the confines of ERISA. The state law does not mandate that those funds be administered or structured in any

¹¹ In *Travelers*, the Court held that the New York statutes "cannot be said to make 'reference to' ERISA plans in any manner" since "[t]he surcharges are imposed . . . regardless of whether the commercial coverage or membership . . . is ultimately secured by an ERISA plan." 115 S. Ct. at 1677. Similarly here, the California apprenticeship prevailing wage provision refers only to the registration system, which, as developed in Part I, *supra*, concerns only the non-ERISA covered apprenticeship training program, and applies without regard to whether that registered training program is financed through an ERISA funding program or otherwise. There is therefore no "reference to" any ERISA plan in the statute.

particular manner. Instead, the only effect the California law has on those funds "simply bears on costs"—in this instance the cost of the underlying apprenticeship training programs, in *Travelers* the cost of insurance and other health coverage. Since neither apprenticeship training programs (under the analysis presented in Part I, *supra*) or health coverage systems are themselves ERISA plans, that impact is "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." 115 S. Ct. at 1683.

C. On our view of the ERISA coverage of apprenticeship plans it is unnecessary to decide anything further. Even if one assumes, however, as did the Ninth Circuit, that ERISA covers the labor standards and training matters embodied in traditional apprenticeship training programs, *Travelers* still dictates the conclusion that there is no preemption under ERISA § 514(a).

First, as the Department of Labor regulations and opinion letters recognize, only a subset of apprenticeship training programs are paid for through a segregated fund, rather than as an aspect of non-ERISA covered day-to-day payroll practices. Therefore, at most only a subset of such apprenticeship training programs are covered by ERISA. Cf. 29 C.F.R. § 2510.3-1(b) (excluding from definition of "employee welfare benefit plan" programs which are funded through regular "payroll practices"); 29 C.F.R. § 2510.3-1(b)(3)(iv) (excluding compensation during time employee is engaged in training and performs little or no productive work); 20 C.F.R. § 2510.3-1(k) (excluding "[u]nfunded scholarship programs" including "tuition and education expense refund program[s], under which payments are made solely from the general assets of an employer or employee organization."); ERISA Advisory Opinion No. 94-14A (apprenticeship programs funded by general assets of an employer or employee organization not covered by ERISA).

Consequently, an implicit reference to registered apprenticeship plans is not a reference to, or a singling out

of, ERISA-covered plans particularly. And this is especially so since the matters covered by the registration standards concern those aspects of apprenticeship plans that are common to *all* of them, funded and non-funded, so that the reference to those standards is not short-hand for a reference to ERISA-covered plans.¹²

Second, on the Ninth Circuit's understanding of ERISA coverage for apprenticeship plans, the impact to be

¹² This case thus raises no question concerning the consequences for ERISA preemption where a state statute does contain an express reference to an ERISA plan or plans. We note, however, that, despite broad statements in several of this Court's cases which, read in isolation, indicate that a specific reference to ERISA-covered plans automatically triggers preemption, in context those statements do not portend that a state law's mere mention of an ERISA plan dooms that law.

Rather, in every case, the point of the verbal reference to ERISA plans in the laws struck down was specially to *burden, prefer, or protect ERISA-covered plans*, rather than simply to treat the plans and their incidents as part of a larger category of entities having some common characteristics not implicating any ERISA concerns. See *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129 (1992), citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) and *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988) (after broad statement that a state statute "specifically refers to welfare benefits plans . . . and on that basis alone is preempted," going on to show that in the case before it and in the cases cited the preempted cause of action or liability is not one of general application but singles out ERISA plans for special treatment or is "premised on" the existence of such a plan.)

Recognizing the contextual import of this Court's "reference to" statements, several lower courts have recently declined to strike down a state law on the purely verbal basis that the statute recognizes the existence of ERISA plans and says how they are to be treated, as part of a rule of more general application. See *Thiokol Corp., Morton Intern., Inc. v. Roberts*, 76 F.3d 751, 759 (6th Cir. 1996); *New York State Health Maintenance Org. Conference v. Curiale*, 64 F.3d 794, 799-801 (2d Cir. 1995); *New England Health Care Union, District 1199 v. Mount Sinai Hospital*, 65 F.3d 1024, 1032 (2d Cir. 1995). Indeed, those courts have noted that a "per se" test that preempts any state law that mentions ERISA plans would lead to absurd results. See, e.g., *Thiokol, supra*, 76 F.3d at 760.

assessed would be the impact of the California prevailing wage law apprenticeship provision not on the ERISA fund alone, but on the training and labor standard aspects of the apprenticeship training program as well. And, in making that assessment, the fair starting point is that the registered apprentice concept does depend upon participation in a plan meeting general programmatic training and labor standards.

But it is equally true that the California statute covers employers, *not* plans, and provides economic incentives but *no* mandate with respect to employer choices about the training and labor standard content of apprenticeship programs. And, it is true here, as a well-reasoned district court opinion points out in an analogous situation with respect to a tax statute that mentions ERISA-covered plans and has some impact on them, "not only is this effect incidental, but [it] is also unavoidable." *Thiokol Corp. v. Roberts*, 858 F. Supp. 674, 680 (W.D. Mich. 1994), *affirmed* 76 F.3d 751 (6th Cir. 1996).

There *are* apprenticeship training programs operating in California that are registered under the federal/state apprenticeship scheme established under the Fitzgerald Act. And, a state prevailing wage law that is *entirely neutral* with respect to the quality of the apprenticeship training programs that will trigger a lower apprentice wage *will necessarily affect* such registered programs. By permitting employers with unregistered programs to obtain the same discount without investing in a quality apprenticeship scheme, such a law would induce more employers not to register (or to deregister) their programs and to provide poorer training for apprentices. And, that alternative would sap the prevailing wage system as a whole, providing a wide loophole for employers seeking to pay some of their employees less than the prevailing wage in their craft without any need to demonstrate that those employees in fact are less skilled or are in training. Alternatively, a state prevailing wage law that *does not make any provision for a lower apprenticeship wage* would have

an even greater impact on apprenticeship plans, by making it extremely difficult, if not impossible, to provide opportunities for apprentices on prevailing wage projects.

In short, the *only* alternative open to the state that would have *no* economic impact upon apprenticeship programs would be the *elimination of the state's prevailing wage program on public works jobs entirely*. To suppose that Congress intended in enacting ERISA to preclude the states from acting in an area of traditional state regulation that, in itself, has nothing whatever to do with ERISA concerns simply because of the resulting need to accommodate by some means or other the impact on an ERISA-related area is to suppose that Congress created an ERISA-centric world—a world in which all ERISA plans must operate in an hermetically-sealed environment insulated from all state influence. The central thesis of *Travelers* is that Congress intended no such creation.

Consequently, the logical conclusion is that where it is the convergence of an ERISA-neutral state law and the existence in fact of ERISA plans that creates the relationship between the state law and the plans, the state's choice among the available ways of dealing with the fact of that convergence, any of which will have a comparable impact on ERISA plans, should *not* be considered a choice that "relates to" the ERISA plans within the meaning of ERISA.

Rather, where there is such an inherent relationship and such a necessary indirect economic impact—as there is in devising state and local tax laws, for example—it is that inherent relationship itself, and *not* the state law, that has an impact on ERISA plans.¹³ Since nothing in ERISA suggests that Congress preferred one form of impact on

¹³ See *Boyle v. Anderson*, 68 F.3d 1093, 1103 (9th Cir. 1995); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 554-55 (6th Cir. 1987).

ERISA plans over another, none of the logically available choices should trigger ERISA § 514(a) preemption.¹⁴

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

MARSHA S. BERZON
SCOTT A. KRONLAND
177 Post Street
San Francisco, CA 94108

DONALD J. CAPUANO
LOUIS P. MALONE
4748 Wisconsin Ave., N.W.
Washington, DC 20016

JONATHAN P. HIATT
815 16th Street, N.W.
Washington, D.C. 20006

LAURENCE J. COHEN
TERRY R. YELLIG
1125 15th Street, N.W.
Washington, DC 20005

LAURENCE GOLD
(Counsel of Record)
1000 Connecticut Ave., N.W.
Washington, DC 20036
(202) 833-9340

¹⁴ In addition to the points made above, as California convincingly argues in its *certiorari* petition, striking down the state law here would impair the operation of the Fitzgerald Act and that Act's implementing regulations by making it impracticable to use apprentices on state public works projects and in that way undermining the Fitzgerald Act's cooperative federal-state apprenticeship scheme). The state law is therefore "saved" from preemption by ERISA § 514(d), 29 U.S.C. § 1144(d).

If the Court should reach this Savings Clause question, however, it should be mindful that this case presents *no* issue as to the *extent* to which state apprenticeship laws are saved by § 514(d). The plaintiff here is *not* complaining about any particular state requirement for the registration of apprenticeship training programs but only about California's refusal to allow plaintiff to pay workers a "subminimum" wage during the period *before* its application for approval of a training program was reviewed and granted. Pet. App. 5-6. That highly particularized Savings Clause issue turns on whether the cooperative federalism scheme established by the Fitzgerald Act and its regulations necessarily allows states to do more than simply mimic the very general Fitzgerald Act regulations in setting apprenticeship registration standards. And that is a complex issue in its own right that should be decided in a concrete, adversarial setting in which the question is actually presented by the case at hand.

JUN 17 1996

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CLERK

STATE OF CALIFORNIA, DIVISION OF LABOR STAND-
ARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP
STANDARDS, DEPARTMENT OF INDUSTRIAL RELA-
TIONS and COUNTY OF SONOMA,

Petitioners,
v.

DILLINGHAM CONSTRUCTION, N.A., INC. and
MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY/COUNTY MANAGEMENT
ASSOCIATION, NATIONAL LEAGUE OF CITIES,
AND U.S. CONFERENCE OF MAYORS,
JOINED BY THE NATIONAL ASSOCIATION OF STATE
AND TERRITORIAL APPRENTICESHIP DIRECTORS,
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the*
Amici Curiae

28 28

QUESTION PRESENTED

Whether Congress, in enacting the Employee Retirement Income Security Act of 1974, intended to preempt state prevailing wage laws limiting payment of a lower apprentice wage on public projects to apprentices registered in programs approved as meeting federal standards.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-789

STATE OF CALIFORNIA, DIVISION OF LABOR STAND-
ARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP
STANDARDS, DEPARTMENT OF INDUSTRIAL RELA-
TIONS and COUNTY OF SONOMA,

v. *Petitioners,*

DILLINGHAM CONSTRUCTION, N.A., INC. and
MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY/COUNTY MANAGEMENT
ASSOCIATION, NATIONAL LEAGUE OF CITIES,
AND U.S. CONFERENCE OF MAYORS,
JOINED BY THE NATIONAL ASSOCIATION OF STATE
AND TERRITORIAL APPRENTICESHIP DIRECTORS,
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

Amici Council of State Governments, National Conference of State Legislatures, National Governors' Association, National Association of Counties, International City/County Management Association, National League of Cities, and U.S. Conference of Mayors are organizations whose members include state, county, and municipal governments and officials throughout the United States, and which have a compelling interest in legal issues that affect state and local governments. These *amici* have a longstanding interest in ensuring the development of proper principles of ERISA preemption to avoid encroachment on the authority of the States in a manner contrary to Congress' intent.

Amicus National Association of State & Territorial Apprenticeship Directors is comprised of the heads of state agencies responsible for administering state and federal laws and regulations to register and monitor quality apprenticeship programs.

States have a longstanding interest both in establishing wage rates on public projects and in protecting apprentices from exploitation. Thirty-two States have prevailing wage laws, and twenty-eight of those States restrict apprentice wages to registered apprentices. Pet. 8 n.2.

The court of appeals' decision threatens these important interests by adopting an overly expansive view of the scope of ERISA preemption. The decision ignores this Court's approach to ERISA preemption, articulated in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S.Ct. 1671, 1677 (1995), which requires looking beyond the text of the preemption

clause "to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." If left uncorrected, the court of appeals' decision will seriously constrain States in their efforts to protect workers on public projects and to foster and encourage quality apprenticeship training pursuant to the Fitzgerald Act, 29 U.S.C. § 50. Yet here, as in *Travelers*, "there is not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." 115 S.Ct. at 1681.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.¹

STATEMENT

This case arose out of California's efforts to enforce its prevailing wage law, which requires that workers on public projects be paid the prevailing wage for their labor. See Pet. 4 (citing Cal. Lab. Code § 1771). California's prevailing wage law contains an exception allowing apprentices to be paid a lower-than-prevailing wage. Cal. Lab. Code § 1777.5. California's law further specifies that in order to qualify as an "apprentice" eligible for the lower apprentice wage, an employee must be registered with an approved apprenticeship program. *Id.*² Any

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

² Approval of apprenticeship programs must be granted by the California Apprenticeship Council, a state apprenticeship council recognized by the federal Bureau of Apprenticeship and Training "as the appropriate body for State registration and/or approval of local apprenticeship programs and agree-

worker who is not registered in such a program does not qualify for "apprentice" wages, and must be paid the ordinary prevailing wage. *See* Pet. App. 4.

In the course of performing work on a public project, Sound Systems Media, a subcontractor of Dillingham Construction, N.A., Inc., employed workers who did not qualify as "apprentices" for wage purposes under California's prevailing wage law because the program in which they were registered had not received state approval. Accordingly, the law required that they be paid the ordinary prevailing wage. *See* Pet. App. 51. Because Sound Systems failed to pay the ordinary prevailing wage to these workers, a "Notice to Withhold" was issued against Dillingham by the State. Pet. 4.

The present case arises out of this wage dispute. California's law is challenged only as applied to Sound Systems' employees, who were ineligible under the law to receive apprentice wages. *See* Opp. 5. Sound Systems' workers did not qualify as apprentices under the wage law because the apprentice training program in which they were enrolled had not been granted state approval during the period in question.

ments for Federal purposes." 29 C.F.R. § 29.2(o); *see* Pet. 3. The federal standards set forth in 29 C.F.R. Part 29, the regulations promulgated pursuant to the Fitzgerald Act, must be met in order for an apprenticeship program to receive approval from the state apprenticeship council. *See* 29 C.F.R. § 29.1(b). No question is presented here regarding state apprenticeship standards that are independent of the federal standards. *See* Reply to Br. in Opp. at 2.

SUMMARY OF ARGUMENT

1. California's law does not "relate to" an "employee benefit plan" within the meaning of ERISA, 29 U.S.C. § 1144(a), and thus is not preempted. The regulation of wage and apprenticeship practices is a traditional exercise of state authority which is presumptively not preempted. "[W]here federal law is said to bar state action in fields of traditional state regulation, we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S.Ct. 1671, 1676 (1995) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Consistent with this presumption, state regulation of ordinary payroll practices falls outside the scope of ERISA's preemption clause. *See, e.g., Massachusetts v. Morash*, 490 U.S. 107 (1989); *see* 29 C.F.R. § 2510.3-1(b). Because California's law involves just such a routine payroll practice and "neither establishes, nor requires an employer to maintain, an employee welfare benefit 'plan' under [the] federal statute," it is not preempted. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 6 (1987). Moreover, preemption here would not serve the primary purpose of ERISA preemption—the "eliminat[ion of] the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Travelers*, 115 S.Ct. at 1677-78 (citations omitted).

2. Even if California's law were found to fall within the scope of ERISA's preemption clause, it would nevertheless be saved from preemption by

ERISA's savings clause, which states that ERISA should not be interpreted "to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d). The Fitzgerald Act, 29 U.S.C. § 50, enacted 37 years prior to ERISA, provides for cooperative federal and state roles in promoting quality apprenticeship programs. It expressly directs the Secretary of Labor "to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship." *Id.* The legislative history of the Fitzgerald Act and the regulations promulgated pursuant to it reinforce the active role of the States in regulating apprenticeship. To find state efforts regarding apprenticeship preempted would render "utterly nugatory" a significant component of the Fitzgerald Act, and would leave the "States without the authority to do just what Congress was expressly trying to induce them to do." *Travelers*, 115 S.Ct. at 1682.

3. Preemption of laws such as California's would have serious negative consequences that are inconsistent with congressional intent. Unless a State can set some standards for the payment of apprenticeship wages, employers will label employees "apprentices" to avoid paying them the prevailing wage but will provide little or no meaningful training. To prevent this practice from eviscerating the prevailing wage law, States will be forced to eliminate the apprentice wage as an option—and with it, all bona fide apprenticeship training programs on public works projects. This result runs directly counter to the States' historic role in regulating apprenticeship and the purposes of the Fitzgerald Act. Such an outcome is insupportable where, as here, "there is

not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." *Travelers*, 115 S.Ct. at 1681.

ARGUMENT

I. CALIFORNIA'S LAW IS NOT PREEMPTED BY ERISA

ERISA's preemption clause covers "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." 29 U.S.C. § 1144(a). The first step in determining whether California's law is preempted by ERISA is to determine whether it falls within the scope of this preemption language—in other words, whether California's requirement that apprentice wages be paid only to apprentices registered in approved programs "relate[s] to" an "employee benefit plan" within the meaning of ERISA. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97-98 (1983). As *amici* discuss below, California's law does not have such a connection with or reference to an employee benefit plan.

Moreover, as this Court explained in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S.Ct. 1671, 1677 (1995), the words of the preemption clause cannot be meaningfully analyzed in a vacuum; a court must "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." When the objectives of the ERISA statute are considered, it becomes even

more clear that Congress did not intend to preempt California's apprenticeship wage laws.

A. Setting Standards for Payment of Apprenticeship Wages on Public Projects Is a Traditional Exercise of State Authority That Is Presumptively Outside the Scope of ERISA Preemption

In an ERISA preemption case, as in any other preemption case, analysis begins with the presumption that traditional exercises of state authority are not preempted. "ERISA pre-emption analysis 'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.'" *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981)). As the Court recently elaborated in *Travelers*:

[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

115 S.Ct. at 1676 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (other citations omitted). See also *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) ("We also must presume that Congress did not intend to pre-empt areas of traditional state regulation.")

(citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

As this Court has repeatedly recognized, wage practices are a traditional area of state authority giving rise to the presumption against preemption. "The States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of governmental authority preserved in our federalist system.'" *Massachusetts v. Morash*, 490 U.S. 107, 119 (1989) (quoting *Fort Halifax*, 482 U.S. at 19).³

Legislation relating to apprenticeship is a classic exercise of state authority. States have been regulating apprenticeship since the late eighteenth century. W.J. Rorabaugh, *The Craft Apprentice: From Franklin to the Machine Era in America* 51 (1986).⁴ In the late 1840's, when "the practice of competitive bidding had spread to state governments," the spe-

³ See also *De Canas v. Bica*, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples.").

⁴ See also Paul H. Douglas, *American Apprenticeship and Industrial Education* 20, 41-52 (1921) (discussing state and local regulation of apprenticeship in colonial times and its link with the related state function of public education); *id.* at 66-69 (state legislation in the 1870's); *id.* at 78-79 (discussing Wisconsin's apprenticeship statute of 1911, administered by a state apprenticeship board and setting standards for working hours and wage rates).

cific problem of employers winning contracts by hiring "apprentices" (who were paid low wages but provided little or no training) emerged. *See id.* at 152. As early as the 1870's, state legislatures began setting apprenticeship training standards to combat the exploitation of apprentices as a source of cheap labor. For example, New York passed an apprenticeship law in 1871 which contained the requirement that "the employer must teach or have the apprentice taught 'every branch of his or their business.'" Douglas, *American Apprenticeship* at 67 (citing Laws of New York, 94th Session, vol. ii, pp. 2147-50, ch. 934). Prevailing wage laws like California's, which place limits on the payment of apprentice wage rates on public projects, are now both widespread and longstanding. *See, e.g.,* Pet. 8 n.2 (Twenty-eight States' prevailing wage laws limit apprentice wages to apprentices in approved programs); *id.* at 6 (California's lower wage rate for apprentices on public projects established 39 years prior to enactment of ERISA).

California's law limiting the payment of apprentice wage rates on public projects is plainly a traditional exercise of state authority. Under this Court's precedents, it is not subject to preemption "unless that was the clear and manifest purpose of Congress." *Travelers*, 115 S.Ct. at 1676 (quoting *Rice*, 331 U.S. at 230). As discussed below, there is no indication that Congress intended to preempt the classic exercise of state regulatory authority at issue in this case.

B. California's Law Relates to a Payroll Practice, Not to an Employee Benefit Plan

ERISA's preemption clause covers, with certain exceptions,⁸ "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." 29 U.S.C. § 1144(a). Although the Court has at times remarked on the breadth of this preemption language, *see, e.g., Shaw v. Delta Airlines*, 463 U.S. 85, 96 (1983), it has also consistently recognized its limits. *See id.* at 100 n.21; *Travelers*, 115 S.Ct. at 1677. In defining the boundaries of the preemption clause, the Court has looked to the underlying purpose of the preemption provision—"eliminat[ing] the threat of conflicting or inconsistent State and local regulation of employee benefit plans" that might create administrative burdens for employers. *Travelers*, 115 S.Ct. 1677-78 (citations omitted).

Specifically recognized as falling outside the scope of ERISA preemption are traditional state wage laws of general applicability that relate only to payroll practices and do not implicate any of the administrative burdens associated with an employee welfare benefit plan. In *Massachusetts v. Morash*, 490 U.S. 107 (1989), the Court held that a Massachusetts law requiring that employers pay workers holiday and vacation payments upon discharge related only to such a "payroll practice," and not to an "employee benefit plan" under ERISA. Likewise, the Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), upheld against an ERISA preemption challenge a Maine law requiring employers to pay

⁸ One such exception, ERISA's savings clause, is directly applicable to this case and is discussed in Part II, *infra*.

workers a one-time severance payment in the event of a plant closing "because the statute neither establishes, nor requires an employer to maintain, an employee welfare benefit 'plan' under [the] federal statute." *Id.* at 6. Similarly, the law challenged here does not establish or require an employer to maintain an employee welfare benefit plan.⁶ It merely sets the wages that must be paid to various categories of employees, including apprentices, and, as a necessary adjunct of doing so, sets the criteria by which workers are classified.

The Court has emphasized that a law may relate to a type of *benefit* listed in ERISA without relating to an employee benefit *plan* within the meaning of ERISA's preemption provision. In *Fort Halifax*, the Court stressed the importance of this distinction:

Appellant's basic argument is that any state law pertaining to a type of employee benefit listed in ERISA necessarily regulates an employee benefit plan and therefore must be pre-empted. . . . In effect, appellant argues that ERISA forecloses virtually all state legislation regarding employee benefits. This contention fails, however, in light of the plain language of ERISA's pre-emption provision, the underlying purpose of that provision, and the overall objectives of ERISA itself.

Id. at 7; see also *id.* at 7-8 ("ERISA's pre-emption provision does not refer to state laws relating to 'em-

⁶ California law regarding apprentices is complex and contains a number of requirements that are not at issue here. See generally Cal. Lab. Code § 1777.5; Pet. App. 2-4. However, the only aspect of California law presently before the Court is the rule that employees working on public projects not be paid apprentice wages unless they are registered in approved apprenticeship programs.

ployee benefits,' but to state laws relating to 'employee benefit plans'") (quoting 29 U.S.C. § 1144 (a)); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139 (1990) ("under the plain language of § 514(a) the Court has held that only state laws that relate to benefit *plans* are pre-empted").

As the *Fort Halifax* Court explained,

The words 'benefit' and 'plan' are used separately throughout ERISA, and nowhere in the statute are they treated as the equivalent of one another. Given the basic difference between a 'benefit' and a 'plan,' Congress' choice of language is significant in its pre-emption of only the latter.

482 U.S. at 8. Thus, even if California's law "relates to" an "apprenticeship or other training program" (a type of benefit listed in ERISA, see 29 U.S.C. § 1002(1)(A)), this is not determinative. Instead, the relevant question is whether the law in question relates to a *plan* established and maintained by the employer to provide this type of benefit. Here, California's law relates only to the level of compensation to be provided employees who are receiving apprenticeship training—a payroll practice outside the scope of ERISA preemption.

Indeed, all "payroll practices," such as payment for work performed, payment at a rate in excess of the normal rate of compensation, and payment for periods in which no work was performed, have been expressly excluded by regulation from ERISA's definition of an "employee welfare benefit plan." See 29 C.F.R. § 2510.3-1(b). Of direct relevance to this case, "[p]ayment of compensation on account of periods of time during which an employee performs

little or no productive work while engaged in training (whether or not subsidized in whole or in part by Federal, State or local government funds)" is among the "payroll practices" listed in the regulation as excluded from the term "employee welfare benefit plan." 29 C.F.R. § 2510.3-1(b)(3)(iv).⁷

The provision of California law at issue here dictates nothing more than the wage rate which must be paid to different categories of employees, including apprentices who are undergoing training. As such, it relates only to an employer's payroll practices, and not to an "employee benefit plan" within the meaning of ERISA's preemption clause. It does not require "establishment or maintenance of an ongoing plan" within the meaning of ERISA, nor does it place any onerous administrative burdens on employers. At most, it affects employers' incentives by encouraging the hiring of apprentices in approved training programs. As discussed below, such indirect economic effects do not trigger ERISA preemption.⁸

C. Any Connection Between California's Law and an Employee Benefit Plan Is Too Tenuous and Remote to Trigger Preemption

The Court has also placed limits on the scope of the words "relate to" in ERISA's preemption clause, noting that "[p]reemption does not occur . . . if the

⁷ This regulatory refinement of the definitions contained in ERISA by the agency charged with administering the statute is plainly reasonable and entitled to deference. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

⁸ Moreover, any economic incentive that encourages employers to hire and train apprentices is in direct furtherance of the goals of the federal Fitzgerald Act. See Part II, *infra*.

state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.'" *Travelers*, 115 S.Ct. at 1680 (quoting *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 n.1 (1992)); see also *Shaw*, 463 U.S. at 100 n.21. For example, the Court has been unwilling to find preempted state laws which have only an incidental or indirect economic impact on ERISA plans. See *Travelers*, 115 S.Ct. at 1679 (indirect impact on economic incentives does not result in ERISA preemption).

Thus, the fact that a state law may have some conceivable connection with a covered plan is not sufficient to establish ERISA preemption. The prevailing wage provision at issue here does not directly regulate training programs, nor does it single out ERISA plans.⁹ Rather, it is "a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan." *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139 (1990). Any conceivable connection to ERISA plans operates only incidentally, and at the remote and tenuous level of economic incentives. As this Court has made clear, however, a remote impact of this nature is too attenuated to result in ERISA preemption.

In *Travelers*, the Court similarly acknowledged the possibility that hospital surcharges might make par-

⁹ The provision at issue here does not mandate that an employer hire apprentices, nor does it impose sanctions on apprentice training programs that fail to meet the standards for state approval. The only consequence of a program's failure to receive state approval is that employees enrolled in such a non-approved program must be paid the ordinary prevailing wage.

ticular insurance providers “more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans.” 115 S.Ct. at 1679. The Court held, however, that such “[a]n indirect economic influence, . . . [which] does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself,” was insufficient to trigger preemption. *Id.*

Of course, any type of wage or employment legislation may have an impact on employers’ costs. “Even basic regulation of employment conditions will invariably affect the cost and price of services.” *Travelers*, 115 S.Ct. at 1679; see *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975, 979 (8th Cir. 1995) (“[a]ny wage regulation has the potential to increase costs to the employer”). Yet the Court in *Travelers* held that to find all such “common state action with indirect economic effects on a plan’s costs” preempted would

effectively read the limiting language in § 514(a) out of the statute, a conclusion that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that “preemption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.”

115 S.Ct. at 1679-80 (citations omitted).

Moreover, the Court in *Travelers* recognized that the phrase “relate to” is, on its own, an inadequate guide to ERISA’s preemptive scope, since “[r]eally, universally, relations stop nowhere.” 115 S.Ct. at 1677 (citation omitted). In order to give effect to

Congress’ limiting language, it is necessary to “go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.” *Id.* When the objectives of ERISA are considered, it becomes even clearer that state wage laws such as California’s were not within the intended scope of ERISA preemption.

ERISA was enacted “to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits” by imposing reporting and disclosure obligations on employers administering such plans. *Morash*, 490 U.S. at 112-13; *Fort Halifax*, 482 U.S. at 15. As the Court has noted, “Congress’ primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.” *Morash*, 490 U.S. at 115. Thus, the statutory scheme is directed at separately funded “plans” in which benefits “accumulate over a period of time and are payable only upon the occurrence of a contingency outside of the control of the employee,” not at the payment of wages out of an employer’s general assets. *Id.* at 116.

Further, as the Court observed in *Shaw*, the primary purpose of ERISA’s preemption clause was to “eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans.” 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams) (quoted in *Shaw*, 463 U.S. at 99); see *Ingersoll-Rand Co.*, 498 U.S. at 142. Where a state law does not introduce any administrative burdens relating to the maintenance of an ongoing plan, preemption would not serve Congress’ purpose. The aspect

of California law at issue here relates only to the wages which an employer must pay out of its general assets; it does not require creation of a plan or impose any administrative burdens on an ERISA plan.

II. CALIFORNIA'S LAW IS SAVED FROM ERISA PREEMPTION BY THE FITZGERALD ACT, PURSUANT TO ERISA'S SAVINGS CLAUSE

Even if California's law were found to fall within the scope of ERISA's preemption clause, it would nevertheless be saved from preemption by section 514(d), 29 U.S.C. § 1144(d). Section 514(d) provides: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."

The Fitzgerald Act, which predates ERISA by 37 years, was adopted to foster and promote quality apprenticeship programs. It expressly directs the Secretary of Labor to "cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship." 29 U.S.C. § 50. The Act, its legislative history, and the regulations promulgated pursuant to it, plainly contemplate that States will take a leading and active role in promoting apprenticeship and setting apprenticeship standards. States had a long history of regulating apprenticeship prior to the Fitzgerald Act, *see* pp. 9-10, *supra*, and the Act was designed to support and coordinate those efforts rather than displace them.

The legislative history of the Fitzgerald Act establishes that States were expected to continue taking primary responsibility for apprenticeship conditions and standards, and were viewed as uniquely well-suited to do so:

It has been amply demonstrated that the responsibilities in connection with the apprentice as an employed worker can best be carried on by the State labor department which is charged with the general responsibility of improving working conditions and fostering the well-being of the workers, and that the responsibilities in connection with the apprentice as a student can best be performed by the State board for vocational education. These State agencies in turn look to the United States Department of Labor and to the United States Office of Education for leadership and research and for the determination of national standards in their respective fields.

House Comm. on Labor, *Safeguard the Welfare of Apprentices*, H.R. Rep. No. 945, 75th Cong., 1st Sess. 5 (1937) (Memorandum of Secretary of Labor). *See also* U.S. Department of Labor, Bureau of Apprenticeship, *Apprenticeship, Past and Present* 20 (1950) (discussing state involvement in setting up apprenticeship programs pursuant to the Fitzgerald Act).

Moreover, the regulations issued by the Department of Labor reinforce the active state role contemplated by the Fitzgerald Act. *See generally* 29 C.F.R. Part 29. The power of the State to prescribe minimum wages for apprentices is specifically set forth in 29 C.F.R. § 29.5(5): "The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement."

The leading role of the States in apprenticeship is also apparent when funding is considered. According to a GAO study, "[i]n 1990, states spent roughly

three times the level of federal spending to support apprenticeship." U.S. General Accounting Office, *Apprenticeship Training: Administration, Use, and Equal Opportunity* 4 (GAO/HRD-92-43) (March 1992). See also *id.* at 18 ("Since 1980, federal appropriations for apprenticeship services have declined by about 30 percent in 1990 dollars."). In addition, given their historic role in education, see, e.g., *United States v. Lopez*, 115 S.Ct. 1624, 1632 (1995), the States are in the best position to develop and promote apprenticeship programs for young people entering the workforce. See generally U.S. General Accounting Office, *Transition From School to Work: States are Developing New Strategies to Prepare Students for Jobs* (GAO/HRD-93-139) (September 1993); U.S. General Accounting Office, *Training Strategies: Preparing Noncollege Youth for Employment in the U.S. and Foreign Countries* (GAO/HRD-90-88) (May 1990).

To find that all state apprenticeship standards are preempted by ERISA would obviously preclude this state role, and would, at the very least, "alter," "amend" and "modify" the Fitzgerald Act (and the regulations promulgated thereunder) to make all references to state participation a nullity. Under the reasoning in *Shaw v. Delta Airlines*, the States' role in enforcing federal standards in a scheme of cooperative federalism must be preserved from ERISA preemption under the savings clause. See 463 U.S. at 102-03.¹⁰ As was the case with the National Health

¹⁰ This case does not involve state apprenticeship standards which are different than the federal standards set forth in regulations promulgated pursuant to the Fitzgerald Act. See Reply to Br. in Opp. at 2.

Planning & Resources Development Act of 1974¹¹ discussed in *Travelers* (in which the federal government was to encourage States to engage in health planning and rate regulation), to find state efforts preempted here would likewise render "utterly nugatory" a part of a federal statute "since it would [leave] the States without the authority to do just what Congress was expressly trying to induce them to do." *Travelers*, 115 S.Ct. at 1682.

III. THE PREEMPTION OF STATE APPRENTICESHIP LAWS WOULD HAVE SERIOUS NEGATIVE CONSEQUENCES

The case against preemption becomes even more clear when one considers the serious negative consequences that would result from preemption of state apprentice wage laws like California's. The approach adopted by the Court in *Travelers* requires consideration of precisely such practical consequences. See *Travelers*, 115 S.Ct. at 1681 (discussing "unsettling result" of finding state law preempted).

Preemption in this instance would have the profoundly "unsettling result" of forcing States, which have long been involved in regulating wage and apprenticeship practices, to effectively eliminate the option of apprenticeship training on public projects. Cf. *id.* As history has demonstrated, unless some standards are set for the payment of an apprentice wage, firms will cut costs by labeling as "apprentices" employees who are provided little or no useful training. See, e.g., Bernard Elbaum and Nirvikar Singh, *The Economic Rationale of Apprenticeship*

¹¹ Pub. L. No. 93-641, 88 Stat. 2225, §§ 1-3 (repealed by Pub. L. No. 99-660, title VII, § 701(a), 100 Stat. 3799).

Training: Some Lessons from British and U.S. Experience, 34 Industrial Relations 593, 602 (Oct. 1995) (“[I]t is well documented that some firms exploited youths by hiring them for apprenticeships at relatively low wages while providing little or no training.”). If a State is powerless to set any standards as to the circumstances under which a lower-than-prevailing apprentice wage may be paid, it must eliminate the apprentice wage as an option or risk complete evisceration of its prevailing wage law by employers who would label low-paid workers as “apprentices” without providing any training. See Pet. App. 51. And because bona fide apprentice training is costly to employers, see, e.g., Douglas, *American Apprenticeship* at 81, quality apprenticeship training will be discouraged unless such a lower-than-prevailing wage is available.

Such an outcome cannot be squared with the presumption against preemption where, as here, “there is not so much as a hint in ERISA’s legislative history or anywhere else that Congress intended to squelch these state efforts.” *Travelers*, 115 S.Ct. at 1681. Moreover, this result would run directly counter to the purposes of the Fitzgerald Act, and cannot be reconciled with ERISA’s savings clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *

Chief Counsel

LEE FENNELL

STATE AND LOCAL LEGAL CENTER

444 North Capitol Street, N.W.

Suite 345

Washington, D.C. 20001

(202) 434-4850

* *Counsel of Record for the*
Amici Curiae

June 17, 1996

JUN 17 1996

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF CALIFORNIA,
DIVISION OF LABOR STANDARDS ENFORCEMENT,
DIVISION OF APPRENTICESHIP STANDARDS,
DEPARTMENT OF INDUSTRIAL RELATIONS;
COUNTY OF SONOMA,

Petitioners,
v.

DILLINGHAM CONSTRUCTION, N.A., INC.;
MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE FOR THE ASSOCIATED
GENERAL CONTRACTORS OF AMERICA, SAN DIEGO
CHAPTER, INC., ASSOCIATED GENERAL
CONTRACTORS OF WASHINGTON, AND INLAND
NORTHWEST CHAPTER OF ASSOCIATED GENERAL
CONTRACTORS OF AMERICA IN SUPPORT OF
NEITHER PARTY

WILLIAM G. JEFFERY
JEFFERY, FERRING & JENKEL
1000 Second Avenue
Suite 3300
Seattle, WA 98104
(206) 623-4600

DAVID P. WOLDS
MERRILL, SCHULTZ & WOLDS,
LIMITED
401 West "A" Street
Suite 2550
San Diego, CA 92101
(619) 234-4525

* Counsel of Record

JOHN G. ROBERTS, JR.*
CARMEL MARTIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

MICHAEL E. KENNEDY
General Counsel
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.
1957 E Street, N.W.
Washington, D.C. 20006
(202) 383-2735

Counsel for Amici Curiae

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

No. 95-789

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DIVISION OF APPRENTICESHIP STANDARDS,
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INTEREST OF AMICI CURIAE

Amici are three chapters of the Associated General Contractors of America, Inc. They each sponsor an apprenticeship training program. The Associated General Contractors of America, San Diego Chapter, Inc., is a

non-profit trade association composed of some 170 general and specialty contractors in southern California. It has sponsored the Associated General Contractors of America, San Diego Chapter, Inc. Apprenticeship and Training Trust Fund since 1988. That Fund was approved by the California Apprenticeship Council in 1988 to train apprentices in the construction crafts of carpenter, drywall lather, cement mason, painter, and drywall finisher, among others.

The Associated General Contractors of Washington is a non-profit trade association, founded in 1922, representing construction contractors throughout western Washington. It is a sponsor of the Construction Industry Training Council of Washington, which provides training for electricians, carpenters, painters, plumbers, and sheet metal workers. Each of these programs has been approved by and registered with the United States Department of Labor, Bureau of Apprenticeship and Training ("BAT").

Founded in 1921, the Inland Northwest Chapter, Associated General Contractors of America—formerly known as the Inland Empire Chapter—is also a non-profit trade association, representing construction contractors throughout eastern Washington. It sponsors a Carpenter Trainee program, which also is approved by and registered with BAT. The members of the Associated General Contractors of Washington and the Inland Northwest Chapter perform the majority of the construction work in the State of Washington, including public, commercial, residential, highway, bridge, industrial, and defense facilities construction.

The amici have been compelled to resort to litigation to resist excessive state regulation of the apprenticeship training programs they sponsor, regulation barred by the preemption clause of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a). *Associated General Contractors, San Diego Chapter, Inc. v. Smith*, 74 F.3d 926 (9th Cir. 1996); *Inland Empire*

Chapter of Associated General Contractors of America v. Dear, 77 F.3d 296 (9th Cir. 1996). That experience affords amici a valuable perspective on the issues before this Court.*

STATEMENT

This case considers whether ERISA preempts certain state regulation of apprenticeship programs. The answer to that question turns on the particular features of the state regulation at issue. It is important to recognize that the nature and scope of state regulation of apprenticeship programs varies greatly, not only from state to state, but from one feature of apprenticeship to another. The issue in the case before the Court is whether ERISA preempts the application of California's prevailing wage law, to the extent that law requires payment of prevailing wages to apprentices in apprenticeship programs unless the program in question has been approved by a state regulatory body. The question arose in connection with an apprenticeship program that not only had not been approved by the state agency, but also had not received federal approval under the standards for such programs promulgated pursuant to the Fitzgerald Act, 29 U.S.C. § 50.

Petitioners made clear in their Petition that they did not seek to raise any question concerning the effect of ERISA on state laws that differ from the federal apprenticeship standards. *See* Pet. at 1 (Question Presented) and 26-27, n.14 ("the issue of ERISA preemption's effect on state authority to impose requirements exceeding those in the federal regulations is not presented here"). Shortly after the Ninth Circuit decided the case now before the Court, however, it decided two different cases that do pose that question. *Associated General Contractors, San Diego Chapter, Inc. v. Smith*, 74 F.3d 926 (9th Cir.

* This brief is filed with the consent of the parties pursuant to S. Ct. Rule 37.3. Copies of the consent letters have been filed with the Clerk.

1996) and *Inland Empire Chapter of Associated General Contractors of America v. Dear*, 77 F.3d 296 (9th Cir. 1996). The Ninth Circuit, relying heavily on its earlier decision finding ERISA preemption in this case, held that ERISA preempted the state laws at issue in those cases as well. Thus, the manner in which this Court resolves the question presented here could have an impact on the Ninth Circuit's reasoning in *Smith* and *Inland Empire*. It is therefore important to bring the circumstances of the *Smith* and *Inland Empire* cases to the Court's attention, and to explain why the result in those cases should be unaffected by whatever the Court does here.

The apprenticeship program in *Smith*, unlike the apprenticeship program at issue here, had been approved by the California Apprenticeship Council ("CAC") and conformed with federal standards. In addition, the requirements the state sought to impose in *Smith*—unlike those at issue here—were not consistent with the federal regulations governing apprenticeship programs. When the sponsor of the program at issue in *Smith* applied to expand its already approved apprenticeship program, the CAC first approved but subsequently denied the application because of a state law requirement that apprenticeship programs be allowed to expand only when a local need for apprentice training can be demonstrated—a prerequisite found nowhere in the federal regulations under the Fitzgerald Act. See 74 F.3d at 930 ("There is no 'need' requirement in the Fitzgerald Act").

Inland Empire dealt with a Washington prevailing wage law with an apprenticeship exception to the requirement that workers on state public works construction projects receive the "prevailing rate," but only if the apprentices were part of a program approved by a state regulatory body. The Washington regulatory scheme also prevented employer contributions to contractor-sponsored trainee programs from being counted as "usual benefits" for purposes of Washington regulation unless the trainee

programs were approved by the state authority. The apprenticeship programs in *Inland Empire*—unlike the one at issue here—met federal standards and had in fact been approved by the United States Department of Labor Bureau of Apprenticeship and Training. The state nonetheless sought to impose its additional requirement of state approval, even though the programs had satisfied federal requirements and received federal approval.

In both *Smith* and *Inland Empire*, the Ninth Circuit held that the state laws were preempted, largely on the strength of *Dillingham*. In both *Smith* and *Inland Empire*, however, the state sought to impose requirements for approval of apprenticeship programs that differed from the federal standards promulgated pursuant to the Fitzgerald Act. Thus, even if this Court were to find that the state law at issue here is not preempted, on the ground that it simply enforced federal standards promulgated under the Fitzgerald Act, the results in *Smith* and *Inland Empire* should be unaffected, because the state laws at issue in those cases are not so limited.

SUMMARY OF ARGUMENT

ERISA governs employee welfare benefit plans, and specifically defines such plans to include any plan, fund, or program established or maintained for the purpose of providing its participants or their beneficiaries apprenticeship or other training programs. 29 U.S.C. § 1002(1). The apprenticeship and training programs at issue here, as well as those at issue in *Smith* and *Inland Empire*, are therefore employee welfare benefit plans covered by ERISA. ERISA's broad preemption clause preempts any state laws that "relate to" employee welfare benefit plans. 29 U.S.C. § 1144(a). The state law at issue here, as well as those at issue in *Smith* and *Inland Empire*, explicitly refer to apprenticeship programs. Those laws accordingly "relate to" an employee benefit plan under ERISA and are therefore preempted, unless they are "saved" by ERISA's "savings clause."

An otherwise preempted state law may be saved by the savings clause if preempting the state law would interfere with federal law. 29 U.S.C. § 1144(d). Petitioners contend that preempting California's prevailing wage law, to the extent it conditions lower apprenticeship wages on state approval of the apprenticeship program, would interfere with the federal Fitzgerald Act. That Act directs the Secretary of Labor to promulgate standards for apprenticeship programs and to cooperate with appropriate state agencies in the formulation and promotion of such standards. 29 U.S.C. § 50. Regulations issued pursuant to the Fitzgerald Act provide that the Secretary may confer on a state agency the authority to determine whether an apprenticeship program conforms with the federal standards established by the Secretary under the Act. When that has happened, preempting the state law pursuant to which the state agency applies those federal standards might well be said to impair the federal law.

But if state prevailing wage laws requiring state authorization for apprenticeship programs are saved from ERISA preemption by the Fitzgerald Act, they are saved only to the extent that they apply federal standards pursuant to an express delegation of authority under the Fitzgerald Act. Any state law conditioning approval on state standards different from the federal standards under the Fitzgerald Act would not meet this test and would detract from rather than promote the goal of uniform, national standards for apprenticeship programs. Such a state law accordingly would not be saved from preemption by ERISA's savings clause.

The state law requirement of a "need" showing at issue in *Smith*, and the requirement of state approval even after federal approval has been obtained at issue in *Inland Empire*, plainly differ from the federal standards established pursuant to the Fitzgerald Act. The savings clause therefore cannot save these state law requirements from preemption, regardless of the Court's holding on the facts of this case.

ARGUMENT

I. THE APPRENTICESHIP PROGRAMS AT ISSUE ARE EMPLOYEE WELFARE BENEFIT PROGRAMS AS DEFINED BY ERISA

ERISA preempts state laws that "relate to" an employee welfare benefit plan, and defines an employee welfare benefit plan as:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such a plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries * * * apprenticeship or other training programs. [29 U.S.C. § 1002(1).]

There is no doubt that the state statute at issue here relates to an employee benefit plan, because it refers expressly to apprenticeship programs, which are clearly "program[s] * * * established * * * for the purpose of providing for its participants or their beneficiaries * * * apprenticeship or other training programs * * *." *Id.* See Pet. App. 10. Petitioners and Amicus AFL-CIO try to develop a distinction between apprenticeship programs and programs established for the purpose of providing apprenticeship programs, see Pet. at 22; Brief of the Building and Construction Trades Department, AFL-CIO, in Support of Petitioners ("AFL-CIO Br.") at 5-14, but the effort is unavailing.

Amicus AFL-CIO relies on *Massachusetts v. Morash*, 490 U.S. 107 (1989). In *Morash*, this Court held that a company's policy concerning payments to discharged employees for their unused vacation time did not constitute an employee welfare benefit plan under ERISA. *Id.* at 120. The state statute in question provided for criminal sanctions against an employer who did not pay a discharged employee his full wages, including vacation payments, on the date of discharge. *Id.* at 109. The

employer in *Morash* moved for dismissal of the criminal charges on the ground that its vacation policy constituted an employee welfare benefit plan under ERISA and ERISA therefore preempted the criminal statute. *Id.* at 110. The parties stipulated that the employer's policy was to pay employees for unused vacation time out of general assets in lump sums upon termination of employment. *Id.* at 111.

The Court concluded that the vacation policy was not an employee benefit plan, emphasizing that the case concerned payments by a single employer out of its general assets. The Court explained that an "entirely different situation would be presented if a separate fund had been created by a group of employers to guarantee the payment of vacation benefits to laborers who regularly shift their jobs from one employer to another." *Id.* at 120-121. The vacation policy was just that—a policy—and not a "plan, fund, or program." Apprenticeship programs of the sort at issue here and in *Smith* and *Inland Empire* do not involve a one-time payment out of general funds. Rather they entail the ongoing delivery of a type of benefit—apprenticeship training—which requires an ongoing administrative structure. They are not simply a "policy" but a plan and a program.

Amicus AFL-CIO also seems to suggest that only programs or funds set up to *finance* apprenticeship programs can be considered employee welfare benefit plans, because ERISA was designed to regulate the "financial aspects of defraying the costs of apprenticeship instruction or program administration" rather than the labor standard aspects of apprenticeship training. AFL-CIO Br. at 8. This is an inappropriately restrictive interpretation of ERISA and the term employee welfare benefit plan. The definition of an employee benefit plan includes "any plan, fund, or program" established to provide an apprenticeship program, and not merely "funds" to establish such programs. 29 U.S.C. § 1002(1).

In any event, the California law is not limited in its reach to labor standards. See Cal. Lab. Code §§ 1771 and 1777.5 (Deering 1991). The approval process allows the state effectively to limit the provision of the employee benefit and, consequently, to regulate the administration of the employee benefit program. *Id.* More to the point, section 1777.5 regulates the financial aspects of the apprenticeship programs in question by requiring an employer to pay specified amounts into a separate fund or to the CAC if a separate fund is unavailable to the employer. Cal. Lab. Code § 1777.5. The law does not merely set labor standards, but significantly and directly affects the administrative and financial aspects of the employee benefit program—precisely the sort of regulation that the AFL-CIO suggests should trigger coverage under ERISA.

Finally, even if the state regulatory scheme only regulated the labor standards of apprenticeship programs, it would still "relate to" an apprenticeship program for ERISA preemption purposes. As the Ninth Circuit has explained, both the financial trust and the apprenticeship standards form "integral part[s] of a larger 'program' established for the purpose of providing 'apprenticeship * * * training.'" *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719, 728 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990). It is impossible to regulate apprenticeship labor standards without affecting the larger apprenticeship program, including its administration and financing.

II. ERISA'S PREEMPTION CLAUSE APPLIES TO STATE ATTEMPTS TO REGULATE ERISA-REGULATED APPRENTICESHIP PROGRAMS

Petitioners contend that there is no need to determine whether the savings clause applies to the state prevailing wage law, because that law is not preempted by ERISA in the first place. Section 514(a) provides that ERISA

"shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title * * *." 29 U.S.C. § 1144(a). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). The law at issue here has an express "reference to" an ERISA plan; it specifically refers to apprenticeship programs and apprenticeship funds. Cal. Lab. Code § 1777.5. It is therefore preempted by ERISA.

This Court's most recent interpretation of the "relates to" phrase in the preemption clause is in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671 (1995). That case, unlike this one, involved a law that did not specifically refer to an employee benefit plan, and the Court therefore had to determine whether the law had a sufficient connection with an employee benefit plan to warrant preemption. No such inquiry is necessary here. Even if it were, however, the state prevailing wage law would still be preempted as applied to apprenticeship programs.

The Court in *Travelers* held that a New York statute imposing surcharges on hospital rates for patients depending on the type of insurance coverage they had was not preempted by ERISA. *Id.* at 1680. The Court recognized that the state law had "an indirect economic effect on choices made by insurance buyers, including ERISA plans," and acknowledged that this economic effect could result in encouraging ERISA plan managers to choose one insurance carrier over another. *Id.* at 1679-80. Nevertheless, the Court concluded that this indirect economic influence did not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." *Id.* at 1679.

By requiring apprenticeship programs to obtain state approval, the state law in this case *does* bind plan admin-

istrators, at least those who want to work on state public works projects, to abide by the state's regulation of the plan itself. The approval requirement gives the state the power to define the various aspects of the program; the California statute even dictates the amount an employer must contribute in trust to support its apprenticeships and requires that an employer without its own trust fund contribute that same amount to the state agency. Cal. Lab. Code § 1777.5; see *Local Union 598 v. J.A. Jones Const. Co.*, 846 F.2d 1213, 1219 (9th Cir.) (mandating a particular level of contribution to an apprenticeship fund directly relates to the employee benefit plan), *aff'd mem.*, 488 U.S. 881 (1988). In addition, if a state denies approval, it essentially denies a plan the ability to provide employee benefits in the form of work opportunities and training to apprentices when working on state public works projects. *Id.* This type of state regulation is undoubtedly preempted by ERISA, because under ERISA "private parties, not the Government, control the level of benefits." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981); see also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10-11 (1987) (ERISA preemption was intended to preclude state interference which might result in employers lowering benefit levels).

An employer may still participate in an unapproved apprenticeship program, by shunning state projects, but such projects play such a significant role in the construction market that this alternative is more theoretical than real. See *ABC National Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343, 347 (9th Cir. 1995) ("The market for apprenticeship programs simply does not equate with the market for health care providers.") (distinguishing *Travelers*). As the court below explained, the state prevailing wage law "has the effect, and possibly the aim" of encouraging participation in state approved ERISA plans while discouraging participation in unapproved ERISA plans." Pet. App. 14 (quoting

National Elevator Industry, Inc. v. Calhoon, 957 F.2d 1555 (10th Cir.), *cert. denied*, 506 U.S. 953 (1992)). Contrary to Petitioners' contention, this economic impact is very different from that in *Travelers*.

This Court in *Travelers* also looked "to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive" preemption. 115 S. Ct. at 1677. This Court has repeatedly emphasized that ERISA's objective is uniformity in employee welfare benefit administration. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52, 58-59 (1990); *Travelers*, 115 S. Ct. at 1679. The preemption clause "was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries." *Ingersoll-Rand*, 498 U.S. at 142.

The state regulation at issue in *Travelers* was not preempted because the law did not "preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishe[d] to provide one." 115 S. Ct. at 1679. On the other hand, the California prevailing wage law, and similar laws in other states, do preclude uniform interstate benefit packages. If these laws are not preempted, each state may specify different required aspects of the benefit package employers wishing to offer apprenticeship programs must include to obtain state approval, contrary to established law that "ERISA pre-empt[s] state laws that mandate[] employee benefit structures or their administration." *Id.* at 1678. See also *Shaw*, 463 U.S. at 97 (holding that a state "Human Rights Law, which prohibit[ed] employers from structuring their employee benefit plans in the manner that discriminates on the basis of pregnancy, and the Disability

Benefits Law which require[d] employers to pay employees specific benefits, clearly 'relate to' benefit plans.")).

Petitioners also contend, again relying on *Travelers*, that since ERISA was not designed to regulate either wages or the operative aspects of apprenticeship programs, state laws that are designed to do so should not be preempted. The Court in *Travelers* did not overrule this Court's conclusion that the preemption clause of ERISA was intended to "sweep more broadly than 'state laws dealing with the subject matters covered by ERISA[,] reporting, disclosure, fiduciary responsibility, and the like.'" 115 S. Ct. at 1680 (quoting *Shaw*, 463 U.S. at 98); *Ingersoll-Rand*, 498 U.S. at 141. In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732, 739 (1985), this Court held that although ERISA "does not regulate the substantive content of welfare-benefit plans," state laws that do so "relate to" ERISA plans and are therefore preempted. As this Court explained in *FMC Corp. v. Holliday*, 498 U.S. at 65, an attempt to limit ERISA's preemptive scope to "core ERISA concerns * * * would be fraught with administrative difficulties, necessitating definition of core ERISA concerns * * * [and] would therefore undermine Congress' desire to avoid 'endless litigation over the validity of State action.'" (quotation omitted).

Travelers did not disturb this understanding of ERISA preemption. The Court in *Travelers* did suggest that deference be given, when possible, to allowing states to continue to regulate in areas which historically have been matters of local concern, 115 S. Ct. at 1676, but only "if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability." *Id.* at 1680 (quoting *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 130 n.1 (1992)); see also *J.A. Jones Const. Co.*, 846 F.2d at 1221 (state interest in regulating labor "is of no consequence" unless

the effect of the state law is "tenuous, remote or peripheral") (quotation omitted). If state law has a significant impact on an employee benefit plan, the state law's application to such a plan must be preempted; the statute may still be applied to non-ERISA plans. If the resulting limitation on state prevailing wage laws inhibits the effectiveness of such state laws, that is the "result of congressional choice and should be addressed by congressional action." *Shaw*, 463 U.S. at 106.

The prevailing wage law determines whether an employer with a certain type of employee benefit plan—an apprenticeship program—can bid for valued state public work opportunities. The law's effect on the plan is far from "tenuous, remote, or peripheral." See *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988) ("we have virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are preempted under § 514(a)") (quotation omitted).

III. IF THE SAVINGS CLAUSE OF ERISA SAVES STATE PREVAILING WAGE LAWS FROM PREEMPTION, IT DOES SO ONLY TO THE EXTENT THAT THEY APPLY FEDERAL STANDARDS PURSUANT TO A DELEGATION OF AUTHORITY UNDER THE FITZGERALD ACT

In their Petition for Certiorari, Petitioners asked the Court to hold that ERISA's savings clause protects from preemption "a prevailing wage law that provides tailored wage rates only for registered apprentices in apprenticeship programs approved as meeting *the standards of the Fitzgerald Act*." Pet. at 8 (emphasis added). Petitioners acknowledged that the question presented is separate and distinct from the question of whether ERISA's savings clause protects a state law that relates to *different* standards for apprenticeship programs, *not* required by the Fitzgerald Act. Pet. at 26-27 n.14.

Section 514(d) of ERISA, the savings clause, provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any of the laws of the United States * * * or any rule or regulation issued under such law." 29 U.S.C. § 1144(d). Petitioners contend that the California prevailing wage law is saved from preemption because its preemption would impair the Fitzgerald Act, which provides that:

[t]he Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, [and] to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship * * *. [29 U.S.C. § 50.]

The federal Bureau of Apprenticeship and Training has promulgated apprenticeship regulations under the Act to provide national standards for approval of apprenticeship programs. 29 C.F.R. §§ 30.1, *et seq.* Regulations have also been promulgated pursuant to the Act establishing "a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the U.S. Dept. of Labor." Pet. App. 36 (quotation omitted). The regulations provide that "[t]he Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards * * *." 29 C.F.R. § 29.12(a).

Since the Fitzgerald Act allows for and encourages a cooperative effort between states and the federal government in the administration of the *federal* apprenticeship standards, preemption of state laws related to *federal*

apprenticeship standards might well be said to impair the Fitzgerald Act. Petitioners rely on *Shaw v. Delta Air Lines, Inc.*, *supra*, in support of such an argument, but the federal law at issue in *Shaw* was Title VII of the Civil Rights Act of 1964. Title VII, unlike the Fitzgerald Act, explicitly preserves non-conflicting state laws, and relies on state laws for its enforcement. *Id.* at 101-102. The Court in *Shaw* noted that preemption of the state Human Rights Law at issue in that case actually would *prohibit* state enforcement of Title VII. Such a result would "frustrate the goal of encouraging state/federal enforcement of Title VII. * * * Such a disruption of the enforcement scheme contemplated by Title VII would, in the words of § 514(d), 'modify' and 'impair' federal law." *Id.* at 102.

By comparison, the Fitzgerald Act merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards * * * to safeguard the welfare of apprentices." 29 U.S.C. § 50. There is no enforcement mechanism; the regulations provide only for a voluntary adjustment of complaints before federal or state agencies. 29 C.F.R. § 29.11; *see Hydrostorage*, 891 F.2d at 731.

The Fitzgerald Act does, however, speak of cooperation between the Federal Government and the states, and regulations issued under the Act create a process for the Secretary of Labor to delegate authority to particular states to approve programs meeting federal apprenticeship standards. If prevailing wage laws requiring state approval of apprenticeship programs are therefore saved from ERISA preemption, they are only saved to the extent that they apply standards promulgated under the Fitzgerald Act. Any state effort to apply any standards different from those found in the Fitzgerald Act rules and regulations for any reason or purpose is clearly preempted. Once an apprenticeship program has been found to meet the federal standards for federal purposes, the

state may not refuse to recognize and approve that program.

The state requirements at issue in *Smith* and *Inland Empire* differed from their federal counterparts. In *Smith*, the State of California attempted to enforce a state statute requiring a demonstration of "need" for the apprenticeship program in the area. *Smith*, 74 F.3d at 928. The Fitzgerald Act does not condition approval on any such showing. In *Inland Empire*, the apprenticeship program in question had already obtained federal approval. *Inland Empire*, 77 F.3d at 298. The Fitzgerald Act allows for either state or federal approval, based on federal standards. *See* 29 C.F.R. § 29.3. The Washington regulatory scheme, however, required state approval even if federal approval had been obtained. *Compare Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270, 274 (9th Cir. 1991) (state regulation requiring state approval in addition to federal approval imposes a requirement independent and apart from the regulations authorized by the Fitzgerald Act and is therefore preempted), *cert. denied*, 505 U.S. 1204 (1992), *with Minnesota Chapter of ABC v. Minnesota Dept. of Labor & Industries*, 47 F.3d 975, 980-981 (8th Cir. 1995) (no preemption where state regulations allow state or federal approval). In addressing similar circumstances in *Shaw*, this Court stated, "[w]e fail to see how federal law would be impaired by preemption of a state law prohibiting conduct that federal law permitted." *Shaw*, 463 U.S. at 103-104.

Petitioners contend that they are merely applying the federal standards and that, if they are preempted, contractors will be able to avoid complying with the federal standards, putting contractors who do abide by the federal standards at a competitive disadvantage. To prevent this result, Petitioners assert, state governments should be allowed to "restrict the apprentice-specific wage to those to whom the nation-wide definition, in the Secretary of Labor's regulation applies—apprentices registered in pro-

grams which meet federal standards, and have the approval to show it." Pet. at 17 (emphasis added). This objective is consistent with the results in *Smith* and *Inland Empire*.

Unlike the application of the prevailing wage law in the case now before the Court, the application of the laws in *Smith* and *Inland Empire* resulted in a refusal to approve apprenticeship programs that met federal standards under the Fitzgerald Act. If states are allowed to impose requirements different from those imposed under the Fitzgerald Act, or may refuse to approve apprenticeship programs already found to meet the federal standards, employers with federally approved apprenticeship programs will again be at a competitive disadvantage and the goal of creating a "nation-wide definition" of apprentice programs will be defeated.

Thus, even if this Court determines that the savings clause prevents preemption of prevailing wage laws in some cases, prevailing wage laws and related state schemes that impose requirements different from the federal requirements under the Fitzgerald Act cannot be saved from preemption.

IV. THE MARKET PARTICIPANT ISSUE IS NOT PROPERLY BEFORE THE COURT, BUT IF CONSIDERED SHOULD NOT AFFECT THE RESULT IN THIS CASE

Amicus AFL-CIO contends that the prevailing wage laws at issue here are not preempted because the State acted as a "market participant" and not a regulator in applying those laws. Petitioners did not raise or address this issue in their Petition. In addition, the market participant theory is borrowed from Commerce Clause doctrine and this Court has not yet addressed whether it may be transplanted to the ERISA preemption context. See AFL-CIO Br. at 15 ("All the ERISA preemption cases decided to date by [the] Court concern state regula-

tory enactments * * *") (emphasis in original). Thus, the issue is one of first impression and should not be addressed here. See *Davis v. United States*, 114 S. Ct. 2350, 2354 (1994) ("[W]e are reluctant to [review an issue raised by an amicus] when the issue is one of first impression * * *"). If the Court does address the issue, however, the result in this case should be unaffected, because (1) the theory is inapplicable to ERISA preemption and (2) the state action in question constitutes regulation and not market participation in any event.

Amicus AFL-CIO contends that because the laws at issue apply only to state public works, the state is acting as a market participant and not a regulator when it enforces those laws. This Court has held that the prohibition in the Commerce Clause barring state regulation that burdens interstate commerce by discriminating against out-of-state entities is inapplicable when states act not as regulators, but as participants in the market. *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

The Court has not had occasion to apply this doctrine to ERISA, but has extended its application to preemption under the National Labor Relations Act ("NLRA"). *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993). In doing so, however, the Court indicated that, since "[t]he NLRA contains no express pre-emption provision," it would not find preemption "unless [the state action] conflicts with federal law or would frustrate the federal scheme, or unless [the Court could] discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Id.* at 224 (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 747-748).

In sharp contrast, ERISA has a very broad, explicit preemption clause, reaching "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). There is no exception for situations in which the state purportedly acts as a market participant, and this Court may not read an exception into the plain language of a statute when Congress has not provided one. The explicitness of this statutory language limits the need to delve into the precedent and legislative history of ERISA. *See Ingersoll-Rand*, 498 U.S. at 138 ("Where * * * Congress has expressly included a broadly worded pre-emption provision in a comprehensive statute such as ERISA, our task of discerning congressional intent is considerably simplified.").

Amicus AFL-CIO contends that the language of the preemption clause limits preemption to state regulation because the term "State" is defined to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. § 1144(c)(2). Amicus argues that the use of the term "regulate" "provides an indication that preemption of state *regulation* is indeed what Congress had in mind in the ERISA preemption provision, not displacement of state authority to decide with whom the state will do business, and on what terms." AFL-CIO Br. at 17 (emphasis in original).

This argument, however, is inconsistent with Supreme Court precedent. This Court has confirmed that the definition of "State" within the preemption provision was intended to "expand[], rather than restrict[]" the general definition of "State" in ERISA. *See Ingersoll-Rand Co.*, 498 U.S. at 141. The AFL-CIO brief tries to save its argument by claiming that, even if the definition of "State" in the preemption section in § 1144(c)(2) is not a limitation on the general definition, it "does provide an indication that what Congress had in mind in adopting

ERISA's preemption provision is *not* different from what Congress ordinarily has in mind when preempting state law." AFL-CIO Br. at 17 n.8 (emphasis in original). This makes no sense; terming § 1144(c)(2) an "indication" of congressional intent to limit the general definition of "State" makes the section no less of a limitation, and this Court has already held that the purpose of the definition was to expand rather than restrict the general definition of "State."

Even if the market participant theory can be applied to ERISA preemption, it is irrelevant here because, as the Ninth Circuit held, California clearly acts as a regulator and not a market participant when it applies the prevailing wage and apprentice laws to contractors. Pet. App. 21 (citing *Hydrostorage*, 891 F.2d at 730). The market participant doctrine does not apply when a state acts with an "interest in setting policy," *Building & Trades Council*, 113 S. Ct. at 1197, and California undoubtedly acts with that purpose when it enforces its prevailing wage and apprentice laws.

In their Petition, Petitioners admitted, indeed went to great lengths to explain, that the prevailing wage and apprentice laws are designed to regulate wages and the operative aspects of apprenticeship programs. Pet. at 24-27. Petitioners emphasized that the State's role with respect to apprenticeship programs is motivated by the governmental objective "to provide young people with the training to succeed in the adult world of work." Pet. at 25. In enforcing these laws, the State acts in its "traditional" role as regulator of wages and apprenticeships. *Id.* at 25-27. Thus, it is not surprising that the State has not raised the market participant theory in this Court. The State has no doubt recognized its inconsistency with their position regarding the Fitzgerald Act. *See Keystone Chapter of ABC v. Foley*, 37 F.3d 945, 955-956 n.15 (3d Cir. 1994) (recognizing the contradiction between applying the market participant theory and claiming a traditional

role as regulator of labor standards), *cert. denied*, 115 S. Ct. 1393 (1995).

CONCLUSION

For the foregoing reasons, if the Court holds that the savings clause saves from preemption prevailing wage laws restricting payment of lower apprentice specific wages to apprentices in state-approved programs, only state approval laws that apply federal standards pursuant to a delegation of authority under the Fitzgerald Act should be saved from preemption.

Respectfully submitted,

WILLIAM G. JEFFERY
JEFFERY, FERRING & JENKEL
1000 Second Avenue
Suite 3300
Seattle, WA 98104
(206) 623-4600

DAVID P. WOLDS
MERRILL, SCHULTZ & WOLDS,
LIMITED
401 West "A" Street
Suite 2550
San Diego, CA 92101
(619) 234-4525

* Counsel of Record

JOHN G. ROBERTS, JR.*
CARMEL MARTIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

MICHAEL E. KENNEDY
General Counsel
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.
1957 E Street, N.W.
Washington, D.C. 20006
(202) 383-2735

Counsel for Amici Curiae

JUN 17 1996

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In The
Supreme Court of the United States

October Term, 1995

CALIFORNIA DIVISION OF LABOR
STANDARDS ENFORCEMENT, et al.,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A.,
and MANUAL J. ARCEO,
dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

**BRIEF OF AMICI CURIAE IN SUPPORT OF
PETITIONERS AND SUGGESTING REVERSAL**

ROBERT E. JESINGER #59550

Counsel of Record

MARK S. RENNER #121008

WYLIE, MCBRIDE, JESINGER, SURE & PLATTEN

101 Park Center Plaza, Suite 900

San Jose, CA 95113

(408) 297-9172

Counsel for Amici Curiae California Association of the Sheet Metal and Air Conditioning Contractors National Association; Sheet Metal and Air Conditioning Contractors National Association; Associated Plumbing & Mechanical Contractors of Sacramento, Inc.; Sacramento Chapter of the National Electrical Contractors Association; Mechanical Contractors Association of America; Northern California Mechanical Contractors Association; Northern California Drywall Contractors Association; Associated Roofing Contractors; Plumbing & Piping Industry Council, Inc.; Plumbing, Heating, Cooling Contractors of California; Construction Employers Association; and Northern California Contractors Association

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CONSENT FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE

Petitioners and Respondent, through their counsel, have consented to the filing of this Brief *Amici Curiae*. The original form indicating the consent of all parties was submitted to the Clerk of this Court with the filing of this Brief *Amici Curiae*.

INTEREST OF AMICI CURIAE

All of the *Amici* are contractor associations whose members have participated in apprenticeship training programs and made substantial contributions to those programs in the State of California, and in some cases throughout the United States. Their member employers have in the past employed apprentices on California State and on Federal public works projects, utilizing the apprentice wage specific rate (lower than journey level prevailing rate) for these apprentices who are duly registered in programs approved by the State of California as meeting Federal standards.

The California Association of the Sheet Metal and Air Conditioning Contractors National Association represents 440 contractors who perform commercial and residential air conditioning and heating, architectural sheet metal, industrial sheet metal, kitchen equipment, metal roofing, sheet metal fabrication, manufacturing, testing and balancing of heat and air, siding and decking. They perform work throughout the western United States and employ and train 971 apprentices in the State of California.

The Sheet Metal and Air Conditioning Contractors' National Association, Inc. has approximately 1900 contractor members engaged in the sheet metal and air conditioning portion of the building and construction industry throughout the United States. Organized contractors in the sheet metal industry represented by this Association train and employ about 10,000 apprentices nationwide and pay approximately \$35-40 million into local, regional and national training programs on an annual basis.

The Associated Plumbing & Mechanical Contractors of Sacramento, Inc. represent 50 contractors who perform plumbing and piping work in commercial, industrial and residential construction. This work takes place mostly in six northern California counties. Together, these contractors train and employ approximately 100 registered apprentices.

The National Electrical Contractors Association, Sacramento Chapter, represents 60 electrical contractors active in industrial, commercial and residential electrical work throughout northern California and northern Nevada. These contractors train and employ over 160 apprentices.

Mechanical Contractors Association of America is a national organization representing over 1,400 employers in the mechanical construction industry. It operates through 75 local affiliate organizations nationwide, all of which are involved in participating apprenticeship training.

The Northern California Mechanical Contractors Association represents 150 contractors who perform

plumbing, piping, heating, air conditioning, and refrigeration work in industrial, commercial and residential construction. This work is performed in northern California and in Nevada. They train and employ approximately 650 registered apprentices.

The Northern California Drywall Contractors Association represents 60 contractors working in the drywall installation and taping industry in the 46 Northern California counties. They train and employ approximately 360 drywall installer apprentices and 71 taper apprentices.

The Associated Roofing Contractors represent 20 large roofing contractors who perform work throughout the same 46 northern California counties. Their members train and employ about 600 apprentices.

The Plumbing & Piping Industry Council, Inc. represents 400 plumbing and piping contractors engaged in this business in the States of California, Arizona, Washington, Oregon, Utah, Colorado, Nevada, Idaho, and Hawaii. They train and employ some 1,000 apprentices.

The Plumbing, Heating, Cooling Contractors of California operates a California State approved unorganized apprenticeship program. It represents 400 contractor members who are engaged in high technology and public works jobs throughout California involving industrial, commercial and residential projects. Their program trains and their members employ approximately 600 apprentices.

The Construction Employers' Association represents 100 general contracting firms in the building and construction industry who perform commercial construction predominately in the 46 Northern California Counties, although some are engaged in such construction nationwide. In connection with this work, they train and employ approximately 800 apprentices on a day-to-day basis and contribute an average of \$1.1 million each year for such training programs.

The Northern California Contractors Association represents 20 unionized contractors who perform residential framing and related carpentry work predominately in the San Francisco Bay Area Counties. They regularly employ apprentices and contribute to pay for such training.

The *Amici Curiae* support the position of the State of California, et al. (Petitioners herein) and seek reversal of the opinion of the United States Court of Appeals for the Ninth Circuit in *Dillingham v. State of California*, as reported at 57 F.3d 712 (9th Cir. 1995).

SUMMARY OF ARGUMENT

An apprentice specific wage rate (lower than that required to be paid to journey level workers on prevailing wage jobs) is essential for the *Amici* contractors to be able to use apprentices economically on public works projects. Apprentices are not as productive as journey level workers. Quality apprenticeship training is expensive. Yet, the effect of the Ninth Circuit opinion creates an economic disincentive for contractors to enter into

apprenticeship agreements that meet the Federal standards for training. Before *Dillingham*, in order to pay the lower apprentice rate, a contractor had to objectively demonstrate that it was actually funding apprentice training to a minimum level by meeting the minimum standards of the Federal Fitzgerald Act enforced by the California State approval process. 29 U.S.C. § 50, 29 C.F.R. § 29.2(e) and Cal. Code Regulations Title 8, § 205(f). Now, unscrupulous contractors can withhold funding, yet still benefit by the lower wage scale. The *Amici* Contractors cannot ignore the economic realities of this inequity.

ERISA was never intended to preempt such traditional areas of State regulations as prevailing wage laws simply because those laws inevitably are applied to employees who happen to be apprentices. Under this Court's test set forth in *New York State Conference of Blue Cross and Blue Shield, et al. v. Travelers*, 115 S.Ct. 1671 (1995), ERISA's preemption provision does not reach to such traditional areas of State regulation. The State must still be empowered to differentiate between an employee on a public work who is enrolled in a legitimate apprenticeship program where payment of a lower than journeyman level wage rate is justified because the employee is demonstrably receiving the benefits of a legitimate apprenticeship program and an employee who is simply classified by the employer as an apprentice to justify paying the lower wage rate without any showing that actual apprenticeship training benefits are being received by the employee.

Moreover, if the preemptive effect of ERISA is to strip the States of their traditional power to regulate wages on public works, *Amici* contractors will be forced to radically

alter the markets in which they participate in a way that will ultimately and profoundly affect the Federal regulation of apprenticeship under the Fitzgerald Act, 29 U.S.C. § 50. By ultimately thwarting the goals and standards of the Fitzgerald Act, Federal law will be impaired, thus excepting preemption of the State's regulatory power at issue here under ERISA's "savings clause." Because of this disruption of existing Federal law, the State's power to regulate prevailing wages for apprentices must be preserved notwithstanding the broad effect of ERISA's preemption provision.

ARGUMENT

I

ERISA's Preemption Provision Was Not Intended to Displace The State's Power to Distinguish Between Legitimate and Sham Apprenticeship Programs For Purposes of Determining the Appropriate Prevailing Wage

Contractors who voluntarily assume training responsibilities under apprenticeship agreements which meet Federal standards incur costs greater than their competitors who do not agree to meet such training standards. This is a cost which these contractors may not be able to afford with respect to public sector projects because of the competitive bidding statutes. These statutes generally require that the public agency award the bid to the "lowest responsible bidder." If ERISA is interpreted to preempt State prevailing wage laws, an unscrupulous contractor will be able to classify all of its workers at the lower apprentice specific wage rate, without having to

meet the Federal standards for apprenticeship training, and thereby obtain a decisive bidding advantage over contractors who have assumed full financial and legal responsibility for meeting the higher and more costly training standards for State approved apprenticeship programs.

Thus, ethical contractors who do not wish to turn prevailing wage laws into the sham now permitted by *Dillingham* will lose public works bids to those contractors who are willing to style all of their workers as "apprentices" and pay them the lowest wages. They can pay the lowest wage after *Dillingham* without committing any resources to actually pay for apprentice off-the-job training. These unethical competitors will have an unfair economic advantage in the bid process by using "paper only" apprentices, i.e., lower paid because they are called apprentices, not because they are being properly trained.

If the Ninth Circuit's preemption analysis is upheld, California's traditional State power to declare which employees can be legitimately paid a lower rate on public construction works is stripped away, and an unseemly charade of competing contractors, all claiming to be engaged in apprenticeship training, but whose supposed apprenticeship activities are beyond the scrutiny of the State, will inevitably result. Workers who have years and years of experience in a trade can one day be issued the emperor's proverbial set of new clothes and become *instant apprentices* [for pay purposes]. If ERISA is said to preempt the State power, the State is left with no authority to question such a charade, for questioning the legitimacy of their new apprentice status becomes the legal equivalent of saying the magic word, the duck comes

down, and ERISA's preemptive effect trumps all. The result is that the prevailing wage statute is neatly and completely circumvented, allowing mischievous contractors to vastly underpay their work forces on public construction projects to the competitive detriment of responsible contractors who attempt to comply with the letter and the spirit of such employee-protective statutes.

If the State's power to distinguish between legitimate and sham apprenticeship programs is preempted, competing bidders on State public works are apt to use virtually any assumption they want to estimate labor costs, all depending on how far that employer wants to stretch his own personal definition of "apprentice." Whether or not that employer will bother to provide any legitimate off-the-job training, on-the-job journeyman assistance, or any other hallmark of a legitimate apprenticeship program, will be outside of the State's power to determine. This inevitably produces a downward pressure on what prevailing wages will be for State public works. This will occur because at the very least *some* contractors submitting bids will assume that a large segment of their work force could permissibly be classified as apprentices regardless of the type of work performed or the skill level of the employee. Competing bidders will in turn eventually have to adjust their assumptions about permissible wage rates in order to have any hope of becoming the lowest bidder. Creation of such a downward pressure on prevailing wages through an entirely contrived devaluation of appropriate compensation is directly contrary to the legislative intent of the prevailing wage statutes – to insure that when the government engages in construction projects, in order to provide fair compensation for the

employees working on those projects, the prevailing wage in the area is to be paid for the labor – not just the lowest possible price.

The net effect of the Ninth Circuit's application of ERISA preemption principles is that through the rubric of preempting State regulation of apprenticeship, State regulation of employee wages is also preempted, swept away in the unbounded logic that such State statutes controlling wages "relate to" an apprenticeship plan, and are therefore preempted. This is precisely the illogical analysis rejected by this Court in *New York State Conference of Blue Cross and Blue Shield, et al. v. Travelers*, 115 S.Ct. 1671 as an overly mechanical application of the statute's phrase "relate to." The effect of preemption of the State's control over its prevailing wage laws here goes far beyond the "objectives of the ERISA statute," – the measure to be used in discerning "the scope of the State law Congress understood would survive" ERISA's preemption provision. *Travelers* at 1677. Consequently, ERISA's preemption provision need not and does not displace the State's traditional power to determine the appropriate prevailing wage for a given employee by distinguishing between a bona fide apprenticeship program and a sham operation connived for the purposes of circumventing State prevailing wage laws.

II

The Savings Clause in ERISA's Preemption Provision Preserves the State's Ability to Judge the Legitimacy of Apprenticeship Training Programs

The Federal Davis-Bacon Act (40 U.S.C. § 276a to 276a-5) rules regarding the payment of prevailing wages

on Federal public works projects restrict the discounted wage rate to apprentices registered in approved programs. 29 C.F.R. § 5.5(a)(4). The State of California, as well as numerous other States, has also had a long standing requirement that a contractor utilize apprentices registered in approved programs in order to receive the wage break and pay the apprentice at the apprentice wage specific rate. If that long standing power is stripped away by ERISA's preemption provision, what inevitably results is a two-tiered system of apprenticeship – a journey level worker can become an apprentice on a State public work without any further State scrutiny of that classification, but is required to be paid the appropriate journey level wage on a Federal public work. This inconsistency can only be avoided if the State retains the power to approve an apprenticeship program without interference from ERISA's allegedly preemptive elimination of that power.

Contractors are also, as a result of the Ninth Circuit's opinion, subject to conflicting State regulation in that they must employ apprentices enrolled with State approved programs on Federal jobs in order to get the lower rate but need not employ such apprentices on State public works jobs. This new dual system for operation of apprenticeship programs necessarily will cause a radically different practice in contractors' bidding practices for State and Federal public works. With the Federal public work standards still subject to the Federal apprenticeship standards, but with State public works completely cast adrift because of the State's inability to determine between a legitimate apprentice and a sham apprentice, in order to remain competitive in bidding for

these respective markets, contractors will be forced to choose to remain in only one or the other, but not both. Apprenticeship training will become meaningless for that market sector bidding on State public works because it will simply be a device to obtain a lower wage rate for unlimited number of employees. Apprenticeship training on Federal public works will be limited to sponsors who are willing to uphold the Federal standards by completely giving up the State public works market, thereby necessarily decreasing those willing to participate in Federal apprenticeship training as envisioned under the Fitzgerald Act.

Without the power to determine which employees legitimately can be paid the lower apprentice wage rate, this newly "deregulated" market will cause radical, unforeseen and completely unintended consequences in the operation of Federal public works and thus the administration of the Fitzgerald Act. For the contractor who wishes to continue to perform Federal public works, under the Fitzgerald Act approval of the contractor's apprenticeship program for Federal purposes must be maintained. Thus, the apprenticeship standards required under that Act's regulations must be upheld by that contractor on *all* jobs as a condition of receiving the wage break for apprentices on Federal public works. However, with no control over which employees might legitimately be paid the lower apprentice wage rate on State public works, that same contractor could not simultaneously maintain the standards necessary to retain Federal approval for Federal public works and still *competitively* bid on State public works where no standards are maintained. If a contractor lowered itself to the new wide-

open State public works definition (or complete lack thereof) of apprentice, such a practice would taint the employer's legitimate apprenticeship program established and approved for Federal purposes, thus causing the employer to lose Federal approval. This inevitably would force employers to remain eligible for Federal public works only by refusing to participate in the sham practices now competitively impelled under post-preemption State prevailing wage laws, thus shrinking the number of employers willing to uphold and promote labor standards on Federal public works. In addition, contractors currently participating in legitimate apprenticeship training on State public works will be impelled to lower their training and labor standards and drop out of the Federal public works market (because they cannot retain Federal approval with such lowered standards) in order to compete in the State public works sector. This, in turn, will also shrink the number of contractors providing apprenticeship training at the higher Federal standard, thus again threatening the Federal goal of promoting labor standards for apprenticeship.

Any of these results, all impelled by the market forces that are set in operation by preemption of the State's power to approve apprenticeship programs, necessarily impedes the goals, purpose and operation of the Federal Fitzgerald Act. That Act envisions a State-Federal cooperative arrangement whereby both entities formulate and promote "labor standards necessary to safeguard the welfare of apprentices." By exerting an extreme downward pressure on those labor standards existing in the State public works market, and by creating an incentive for those participating in the Federal public works market

to exit that market in order to participate in the newly-unregulated State public works market, the essential purposes, as well as the specific application of the Fitzgerald Act is impaired. As such, under the savings clause of ERISA's preemption provision, this interference with existing Federal laws and regulations mandates that the State's power to regulate apprenticeship in this fashion is saved from ERISA preemption.

CONCLUSION

The Court should reverse the Ninth Circuit because its decision in *Dillingham* is bad for business, bad for the public, and bad for the workers. In this day of deregulation, it may seem odd that a group of construction contractors would welcome State regulation of apprenticeship prevailing wages. But there is a simple and logical reason for this.

Contractors plan for the present as well as the future. The *Amici* contractors are desirous of continuing a healthy, sustained and legitimate apprentice training environment. Indeed, the greatest challenge for construction companies (and indirectly the construction users) in the immediate future is to find a sufficient number of skilled, trained journey level workers. The *Amici* contractors realize this all too well. To have any chance of creating a large enough pool of skilled construction workers, apprentice programs must include certain minimum training standards. Attracting and keeping good workers requires an "appropriate" prevailing pay rate for apprentices based upon the economic conditions in the

State and locale in which they are working. It is not necessary that this appropriate prevailing pay rate be based upon union contract rates or non-union working conditions, but instead is appropriate if it is a prevailing rate. Indeed, Amicus Plumbing, Heating, Cooling Contractors of California presently maintains a State approved unorganized apprentice training program, subject to the same economic realities as the organized programs. However, maintenance of such prevailing rates on State public works projects will be severely eroded if the *Dillingham* preemption analysis is upheld, thus eventually impeding the *Amici* Contractors' overall ability to maintain minimum training standards so as to produce a skilled labor force for their use.

Moreover, maintenance of such minimum training standards must necessarily be accomplished by the mandate of State prevailing wage laws rather than through voluntary private agreements. It would not be appropriate for employers to combine among themselves to agree upon this prevailing rate, without the anti-trust protections of a union contract, because this would violate the anti-trust laws. However, it is permissible for a State, acting as a regulator, to survey and determine the appropriate apprentice specific prevailing rate payable on State public works projects. California Labor Code § 1777.5.

The *Amici* contractors have for years expended substantial sums of money to fund apprentice training programs. This has been economically possible because they could pay the State developed lower prevailing pay rates for their apprentices. This funded training and pay have encouraged apprentices to continue working in the industry and working towards the journey level skill and pay.

In exchange for this substantial funding and participation in approved programs which establish minimum standards to insure the health of the apprentice training environment, the employers who expend such monies have been entitled to pay the lower rate to apprentices enrolled in these programs. The economics of this practice, which have provided business, the public and workers a healthy environment and sustained apprenticeship training growth for over 35 years before ERISA, are severely threatened by an overly broad reading of ERISA's preemption effect. It should be reversed based upon a comparison of the Congressional intent behind ERISA and the Congressional intent behind the Federal Fitzgerald Act, both of which cry out for a result other than the one delivered by the *Dillingham* Court.

Dated: June 17, 1996

Respectfully submitted,

WYLIE, MCBRIDE, JESINGER,
SURE & PLATTEN

ROBERT E. JESINGER
MARK S. RENNER

16
NO. 95-789

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1995

STATE OF CALIFORNIA, Division of Labor Standards
Enforcement, Division of Apprenticeship Standards, Department
of Industrial Relations, County of Sonoma,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., Inc.,
Manuel J. Arceo, dba Sound Systems Media,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE STATES - WASHINGTON, NEW YORK,
ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

LYNN D. W. HENDRICKSON
*JEFF B. KRAY
Assistant Attorneys General

**Counsel of Record*
P.O. Box 40121
Olympia, Washington 98504-0121
(360) 459-6571

[Additional counsel
on inside cover]

DENNIS C. VACCO
Attorney General
State of New York

VICTORIA A. GRAFFEO
Solicitor General

DANIEL F. DE VITA
M. PATRICIA SMITH
Assistant Attorneys General

Dept. of Law - Labor Bureau
120 Broadway
New York, NY 10271
(212) 416-8707

441 PP

WINSTON BRYANT
Attorney General - State of Arkansas
State of Arkansas
200 Tower Building
323 Center Street
Little Rock, AR 72201
(501) 682-2007

M. JANE BRADY
Attorney General - State of Delaware
820 N. French Street
Wilmington DE 19801
(302) 577-3047

CHARLES F.C. RUFF
*Corporation Counsel -
District of Columbia*
441 4th St. NW, 10th Fl.
Washington D.C. 20001
(202) 727-6248

MARGERY S. BRONSTER
Attorney General - State of Hawaii
State of Hawaii
Hale Auhau
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

ANDREW KETTERER
Attorney General - State of Maine
6 State House Station
Augusta, ME 04333
(207) 626-8800

J. JOSEPH CURRAN JR.
Attorney General - State of Maryland
200 Saint Paul Place
Baltimore MD 21202-2202
(410) 576-6336

SCOTT HARSHBARGER
*Attorney General -
State of Massachusetts*
One Ashburton Place
Boston MA 02108-1698
(617) 727-2200

FRANK J. KELLEY
Attorney General - State of Michigan
P.O. Box 30212
Lansing, MI 48917
(517) 373-1124

HUBERT H. HUMPHREY III
Attorney General - State of Minnesota
Capitol Building Rm. 102
St. Paul, MN 55115
(612) 297-4272

JOSEPH P. MAZUREK
Attorney General - State of Montana
Justice Building
P.O. Box 201401
Helena MT 59620-1401
(406) 444-2026

FRANKIE SUE DEL PAPA
Attorney General - State of Nevada
198 South Carson Street
Carson City NV 89710
(702) 687-4488

DEBORAH T. PORITZ
Attorney General - State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CN 080
Trenton NJ 08625
(609) 292-8567

THEODORE R. KULONOSKI
Attorney General - State of Oregon
100 Justice Building
Salem OR 97310
(503) 378-4402

THOMAS W. CORBETT, JR.
*Attorney General of the
Commonwealth of Pennsylvania*
16th Fl., Strawberry Square
Harrisburg PA 17120
(717) 787-1100

QUESTION PRESENTED

Whether Congress, in enacting the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), intended to preempt traditional state labor laws which restrict a public work contractor's payment of a specific lower wage to apprentices duly registered in programs meeting federally promoted minimum standards?

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I. INTEREST OF THE AMICI

Washington, New York, Arkansas, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, Oregon, Pennsylvania and the District of Columbia submit this brief as *amici curiae* in support of petitioner, State of California, and urge this Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit in *Dillingham v. State of California*, 57 F.3d 712 (9th Cir. 1995). This brief is submitted on behalf of fifteen states, by their attorneys general. As a result consent to its filing is not required. SUP. CT. R. 37.5.

The *amici* States have a strong interest in ERISA preemption issues.¹ States have an interest in assuring that the scope of ERISA preemption is kept within the ambit of Congressional intent and that the States' remaining sphere of regulation is not improperly intruded upon. Although the scope of ERISA preemption is broad, there is no indication that Congress intended to preclude traditional state regulation of wages, or the quality of apprenticeship or any other benefit an ERISA plan may provide.

The *amici* States have a specific interest in this case, since many of them, like California, allow payment of lower "apprentice" wages on state public work projects only to apprentices registered in programs which meet federal minimum standards established under the National Apprenticeship Act, 29 U.S.C. § 50 ("Fitzgerald Act"). These standards are the result of a longstanding cooperative federal-state effort in the formulation, promotion, and

¹ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993)).

enforcement of quality apprenticeship programs and standards through program registration. The standards are designed to protect apprentices from exploitation and poor training and to protect the public by assuring that apprentices acquire the highest quality skills.

Apprenticeship programs are not required to register in order to operate. Instead, the *amici* States, following the lead of the federal government, offer incentives to apprenticeship programs which agree to meet the minimum standards. The single most important incentive for programs to register is the ability to pay a lower wage to apprentices on public construction projects.

The Ninth Circuit's decision must be reversed in order to maintain traditional state authority to regulate wages; to protect and preserve the respective prevailing wage laws of *amici* States represented herein; and to secure the longstanding federal-state cooperative effort in the formulation, promotion, and enforcement of quality apprenticeship programs and standards. Cooperative federal-state regulation of apprenticeship is seriously undermined by application of the statutory analysis of ERISA provisions utilized by the Court of Appeals for the Ninth Circuit in *Dillingham*.

II. SUMMARY OF ARGUMENT

Preemption of laws that restrict apprentice wage rates to apprentices in programs which meet federal minimum standards will significantly impair the enforcement of quality apprenticeship standards and undermine state prevailing wage and minimum wage laws. If the Ninth Circuit's decision is upheld, anyone in an apprentice program subject to ERISA can be paid an

apprentice wage on state public construction projects, no matter how dubious the quality of the training provided. As a result, apprenticeship programs will have few incentives to adhere to the federal minimum standards. Without adherence to the standards, the quality of apprenticeship training will suffer, with a concomitant fall in the quality of the craft work done by these apprentices both now and in the future when they master journey level skills.

In addition, the states' longstanding prevailing wage laws will be easily circumvented. Employers will be able to establish apprenticeship programs of questionable quality and complete public construction projects with these "apprentices" at a lower cost, enabling them to underbid employers with more costly registered apprenticeship programs. In the absence of some uniform definition, anyone labelled an "apprentice" will be paid less than prevailing journey level wages, regardless of whether they are receiving the training and supplemental instruction necessary to master their craft. If this happens, states may be inclined to bar apprentice wages on state public works projects. This would further limit the work and training opportunities for legitimate apprentices.

California's prevailing wage exemption for registered apprentices is a law of general application which does not refer to, single out, or subject ERISA plans to different treatment. The law applies to all apprentices regardless of whether the apprenticeship program is a benefit provided by a plan subject to ERISA.

By allowing only registered apprentices to be paid a lower wage, California's law provides an indirect economic incentive for apprenticeship programs to meet minimum standards through registration. However, it does

not bind plan choice. A contractor who chooses not to use registered apprentices has numerous options and many apprenticeship programs continue to operate unregistered. Since the law operates merely as an indirect economic influence on a plan's decision, it is insufficiently related to ERISA to be preempted.

California's apprentice exemption also does not relate to ERISA plans because it does not influence choice of plan structure or administration. The minimum apprenticeship standards relate solely to the quality of apprentice training, the benefit provided by plans, rather than the plan itself. This distinction is critical because ERISA does not preempt state laws that relate solely to benefits.

States have traditionally regulated the quality of health care, legal services, day care, and apprenticeship training. When these benefits are provided by ERISA plans, ERISA governs the administration of the plan, but it does not regulate the quality of the benefits. There is no indication that Congress intended to strip the States of their ability to apply quality control standards to these traditional areas of State concern simply because the benefits are provided by ERISA plans.

III. ARGUMENT

A. Preemption Will Significantly Impair The Longstanding Federal-State Cooperative Effort In The Formulation, Promotion, And Enforcement Of Quality Apprenticeship Programs And Standards As Well As The Respective Prevailing Wage Laws Of *Amici* States.

The education of youth is a matter of traditional state concern. Apprenticeship is one of the oldest forms of training young people in a skilled craft. It combines the learning of manual skills with the study of related classroom subjects. The states have been involved in apprenticeship training since colonial times. R.F. Seybolt, *COLONIAL APPRENTICESHIP AND EDUCATION*, (1917). Between 1783 and 1799, twelve of the sixteen States of the Union passed statutes concerning apprenticeship. W.J. Rorabaugh, *THE CRAFT APPRENTICE: FROM FRANKLIN TO THE MACHINE ERA IN AMERICA* 51 (1986). These laws codified practices inherited from the English Common Law. In the 1800's States started regulating apprentice indenture agreements. *Id.* For example, New York first enacted legislation regulating apprenticeship indenture agreements in 1830. New York State Department of Labor, *REGISTERED APPRENTICESHIP TRAINING IN NEW YORK STATE*, 1 (1980). In 1871, it enacted a comprehensive apprenticeship law. New York's concern with the quality of apprenticeship training was reflected in the law's requirement that employers "carefully and skillfully" train apprentices. 1871 N.Y. Laws ch. 934, pp. 2147-50. Wisconsin developed the modern model for governmental stimulation of formal apprenticeship training when, in 1911, it passed a law establishing a state apprenticeship council. 1911 Wisc. Stats. Ch. 347.

A vigorous, coordinated, national apprenticeship policy came into existence with the passage of the Fitzgerald Act in 1937. 29 U.S.C. § 50. The focus of the Act was to protect "apprentices through the establishment of minimum labor standards, promoting apprenticeship as a system of training skilled workers and encouraging the federal government to cooperate with state agencies in formulating apprentice standards." *Joint Apprenticeship and Training Council of Local 363 v. New York State Dep't. of Labor*, 984 F.2d 589, 591 (2d Cir. 1993) (citing 29 U.S.C. § 50-50b (1988 & Supp. III 1992) and statements of Representative Fitzgerald in the Congressional Record).

One of the federal government's first goals under the Fitzgerald Act was to encourage maximum state involvement. Model state apprenticeship legislation was drafted. Many states, following the Fitzgerald Act's commitment to the welfare of apprentices and desire to foster cooperation with states, enacted complementary state apprenticeship councils or programs². These programs reflected the existence and the need to adopt or harmonize apprenticeship standards with the policies of the United States Department of Labor. From the passage of the Fitzgerald Act to July 1945, "twenty-four states had established apprenticeship councils either under specific

² The twenty-seven states have state Apprenticeship Agencies or Councils which are recognized by the Bureau of Apprenticeship and Training of the Department of Labor. They are: Arizona, California, Connecticut, Delaware, Florida, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and Wisconsin. The District of Columbia, Puerto Rico and the Virgin Islands are also recognized. U.S. Dept. of Lab., Emp. & Training Admin.: Bureau of Apprenticeship & Training, Directory (Jan. 1995).

state laws or under the general powers of the governor or the commissioner of labor. A new era in the development of apprenticeship had begun." Eugene Danaher, *Apprenticeship Practice in the United States* 3 (1945). The states continue to encourage the creation of quality apprenticeship programs.

Directives from the Secretary of Labor have been integral to the development of state apprenticeship programs. Staff and field representatives of the Federal Bureau of Apprenticeship and Training have consistently been instructed to work with state apprenticeship councils to do the most for apprenticeship. For example, as early as 1948 it was noted:

to assure complete cooperation between the State and Federal apprenticeship agencies it is essential that there be clear understanding between them as to the functions and responsibilities of each. ...As a rule it can be said that the State apprenticeship agency is responsible for the development of standards and policies and the Bureau of Apprenticeship is responsible for executing the policies that is, for developing local and State programs of apprenticeship and for maintaining them. In some instances it has been found practical to share office space with State apprenticeship councils.

U.S. Dept. of Labor, Bureau of Apprenticeship, *Manual for Field Representatives* 15-16 (1948); U.S. Dept. of Labor, Manpower Administration, *Bureau of Apprenticeship and Training Policy Manual* 30 (1968); and U.S. Dept. of Labor, Manpower Administration, *Handbook for Bureau of Apprenticeship and Training* 34 (1974).

As Congress was considering and enacting ERISA, the U.S. Department of Labor was emphasizing the cooperative federalism scheme of the Fitzgerald Act. Soon after ERISA was passed, the Bureau of Apprenticeship and Training sent a circular to its field staff stressing that its policy was to promote and establish State Apprenticeship Agencies or Councils in all states and to cooperate with established councils in the promotion of apprenticeship standards. Bureau of Apprenticeship and Training, Circular No. 75-25, U.S. Department of Labor, (May 30, 1975). Federal regulations, first proposed in 1975 and finally promulgated in 1977, state:

The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, of acceptable apprenticeship programs with the U.S. Department of Labor. ... These labor standards, policies and procedures cover the registration ... of apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matters relating thereto.

29 C.F.R. § 29.1. (1994) (emphasis added).

The regulations that implement the Fitzgerald Act permit state agencies to apply to the United States Secretary of Labor for federal recognition as a State Apprenticeship

Agencies or Council.³ If the state agency's standards and procedures are in conformity with federal standards, the state becomes federally approved and empowered to establish, for federal and state purposes, requirements for apprenticeship programs as well as procedures by which to determine issues of registration. *Local 363 v. New York State Dept. of Labor*, 829 F.Supp 101, 103 (S.D.N.Y. 1993); 29 U.S.C. §§ 50-50b (1994). The establishment of *amici* State apprenticeship programs predates the 1974 enactment of ERISA.⁴

The Fitzgerald scheme is voluntary. Apprenticeship programs are encouraged, but not required, to meet minimum federal standards through program registration.

The major incentive for contractors to use apprentices in registered programs is the ability to pay those apprentices less than prevailing wages on publicly funded construction, *See General Accounting Office, Apprenticeship Training:*

³ Section 1 of the National Apprenticeship Act of 1937 (29 U.S.C. 50). Additional rulemaking authority is supported by the Reorganization Plan No. 14 of 1950 (64 Stat. 1267; 3 C.F.R. 1949-53 Comp., p. 1007), the Copeland Act (40 U.S.C. § 276c (1994)), and 5 U.S.C. § 301 (1994).

⁴ DEL. CODE ANN., tit. 19, §§ 201, 203 (1995) (enacted 1963); HAW. REV. STAT. § 372-4 (Michie 1995) (enacted 1941); ME. REV. STAT. ANN. tit. 26, § 1002 (West 1995) (enacted 1954); MD. ANN. CODE, LAB. & EMPL. ART., § 11-405 (1995) (enacted 1957); MASS. GEN. LAWS ANN. ch. 23 § 11E (West 1995) (enacted 1941); MINN. STAT. § 178 (1994) (enacted 1939); MONT. CODE ANN. § 39-6-101 (1993) (enacted 1941); NEV. REV. STAT. § 53.610.020 (1993) (enacted 1939); N.J. REV. STAT. ANN. § 34:1A-36 (West 1995) (enacted 1953); N.Y. LAB. LAW § 810 *et seq.* (McKinney 1989) (enacted 1945); OR. REV. STAT. § 660.120 (1993) (enacted 1955); 43 PA. CONS. STAT § 90.3 (West 1995) (enacted 1961); WASH. REV. CODE § 49.04.010 (1994) (enacted 1941).

Administration, Use and Equal Opportunity, GAO/HRD 92-43, 11 (1992).

State regulation of wages on public works projects is also a longstanding area of state concern. Thirty-one states have enacted prevailing wage laws which require contractors who perform public works projects to pay their workers on these projects not less than wages which prevail in the community.⁵ Twenty-seven of these states allow payment of apprentice prevailing wages but restrict the lower wage to apprentices registered in apprenticeship programs which meet federal minimum standards.⁶ Many of these state provisions also predate the enactment of ERISA. The purpose of these statutes is to provide an objective, readily determinable standard to ascertain whether a person designated as an apprentice on public work is a legitimate apprentice, entitled to receive less than

⁵ Armand J. Thieblot, *Prevailing Wage Legislation: the Davis-Bacon Act, State "Little Davis-Bacon" Acts, the Walsh-Healey Act, and the Service Contract Act* 140 (2d Print 1987). Mr. Thieblot's article included a table identifying the existence of prevailing wage laws by state and date of enactment. A copy of that table is attached as Appendix A-1. Since the table was last published additional states have repealed their prevailing wage laws. Louisiana repealed its prevailing wage law in 1986. Texas repealed its prevailing wage in 1987. Oklahoma has its prevailing wage law invalidated by court decision in 1995.

⁶ The state provision of lower apprentice wage rates is in effect through statutes, rules and regulations. Illustrative amici State statutory references are: ARK. CODE ANN. § 22-9-302(2) (1995) (enacted 1969); HAW. ADMIN. R. § 12-22-6(1) (1996) (enacted 1955); MINN. R. 5200.1070 (1995) (enacted 1977); N.Y. LAB. LAW § 220(3) (McKinney 1986) (enacted 1966); and WASH. REV. CODE § 39.12.021 (1994) (enacted in 1963).

journey level prevailing wage.⁷

Federal-State coordination of efforts and responsibilities in the promotion of apprenticeship programs and standards has a synergistic effect. States invest heavily in apprenticeship regulation and design programs to suit the particular needs and goals of each State. The States have spent almost three times as much money on apprenticeship as the Federal Government's Bureau of Apprenticeship and Training.⁸ The displacement of the States from their traditional role would leave a significant financial hole for the Federal Government to fill. A major construction industry participant has aptly noted:

the Federal Government lacks the resources to monitor the structure and operations of all apprenticeship programs nationwide. It relies upon the States, through the approved State Apprenticeship Councils, to perform much of this enforcement function.

⁷ For example, New York's lower wage provision for apprentices was enacted in 1966 because certain contractors had been classifying journey level workers in one trade as apprentices in another trade, thereby circumventing the prevailing wage law. The provision was also enacted as an economic incentive for contractors to register apprenticeship programs. At the time, registration of apprenticeship programs was considered threatened by recently enacted non-discrimination standards imposed upon apprenticeship programs. See *Memorandum of The Industrial Commissioner concerning "An Act to amend the labor law in relation to the employment of apprentices on public work,"* Senate Intro. 1609 - Print 1654, 87th Leg., 3d Sess. (June 15, 1966).

⁸ General Accounting Office, *Apprenticeship Training: Administration, Use and Equal Opportunity*, GAO/HRD 92-43, 11 (1992).

Senate Committee on Labor and Human Resources, *ERISA Preemption of State Prevailing Wage Laws, Prepared statement of Robert A. Georgine, president, Building and Construction Trades Department, AFL-CIO*, 103rd Congress, 2d Sess. at 66 (March 10, 1994).

The *Dillingham* decision provides an economic disincentive for contractors to devote resources to the provision of necessary, comprehensive apprenticeship programs. If allowed to stand, the *Dillingham* decision will have one of two results. Either a contractor will no longer have to demonstrate that an individual on a job site is actually in a bona fide apprenticeship program because mere classification of a laborer as an "apprentice" will be sufficient to allow an apprentice wage rate, or, more likely under the analysis used in *Dillingham*, States will be prohibited from allowing any distinct wage rates for "apprentices" because such incentives would encourage apprenticeship over other training programs. See *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1115 (10th Cir.), *cert. denied*, 113 S. Ct. 406 (1992). In that case, states desiring completion of quality public works projects will likely react by removing the apprentice wage rate all together. This will significantly increase the cost of public work to the states and remove the economic incentive for contractors to use apprentices on state public work. Bona fide apprenticeship programs that depend on public works to provide the thousands of on-the-job training hours needed to produce a trained, journey-level employee will vanish.

B. State Laws Which Use Economic Incentives To Encourage Quality Control Standards For Apprenticeship Training Do Not Relate To ERISA-Covered Apprenticeship Plans.

Congress enacted ERISA as a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). However, ERISA's protection of participants in employee benefit plans, such as apprenticeship training, extends only to the administration of benefit plans. *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671 (1995) ("*Travelers*"). ERISA does not require the provision of benefits, nor does it substantively regulate any of the benefits which may be provided by plans.

ERISA does contain a preemption provision which broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). This Court, in an early attempt to define the scope of ERISA preemption had held that a law "relates to" an employee benefit plan if it has a "connection with or reference to such a plan." *Shaw*, 463 U.S. at 96-97; see also *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41, 47 (1987); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 138-39 (1990). Last year, in *Travelers*, this Court acknowledged the limitations of its earlier test, stating that "we have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here." 115 S. Ct. at 1671.

In *Travelers*, this Court held that a state law which has an indirect economic influence on the choices ERISA plans make concerning benefit structures or administrative practices, but which does not bind plan administrators to any particular choice, does not relate to ERISA plans for purposes of federal preemption. Guided by "respect for the separate spheres of governmental authority preserved by our federalist system," this Court reaffirmed that it approaches preemption questions with the "presumption that Congress does not intend to supplant state law." 115 S. Ct. at 1676 (citing *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 522 (1981)). Moreover, in cases where the state is acting in areas of traditional state concern, the Court works on the assumption "that the historic police powers of the States are not to be superseded by the federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 1676 (citations omitted).

Recognizing that the key phrase "relate to" is unhelpful, this Court looked instead to the objectives of ERISA as a guide in determining which state laws Congress intended ERISA to preempt. Since the intent of ERISA's preemption clause is to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans," a state law which does not bind plan choice, but merely influences it, does not "function as a regulation of the ERISA plan itself", unless the influence is so great that ERISA plans are forced to adopt certain administrative schemes. *Id.* at 1678, 1679, and 1683. Applying these principles to state regulation of apprentice wages on state public work projects yields the conclusion that such regulation does not relate to ERISA-covered apprentice training plans.

1. State Laws Which Regulate Apprentice Wages Do Not Refer To Nor Are They Specifically Directed Toward ERISA Plans.

In *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 103, 125 (1992), this Court held that a law which "specifically refers to employee benefit plans regulated by ERISA" was preempted. In *Travelers*, this Court held that health care surcharges did not refer to ERISA plans because they were imposed on commercial insurers and health maintenance organizations regardless of whether coverage was purchased by an ERISA plan. 115 S. Ct. at 1683. Similar to the health care surcharges addressed in *Travelers*, California's prevailing wage law exemption for registered apprentices is a law of general application which does not refer to, single out, or subject ERISA plans to different treatment. All contractors are required to limit the apprentice wage to apprentices in approved programs regardless of whether the apprenticeship program is a benefit provided by a plan subject to ERISA. Thus, the apprentice wage rate provision operates without regard to whether the apprenticeship program is a benefit plan subject to ERISA. The Ninth Circuit ignored *Travelers* and failed to recognize that apprenticeship programs can exist independent of an ERISA plan.

Like health care or day care, apprenticeship is a benefit provided by ERISA plans but it is not an ERISA plan itself.⁹ Nor, is it provided exclusively by employers.

⁹ The short hand term "ERISA plan" is used instead of employer welfare benefit plan, recognizing that some employee welfare benefit plans are exempt from ERISA coverage, i.e., governmental plans. 29 U.S.C. § 1003(b)(1).

Apprenticeship programs can, under federal regulation, be sponsored by any "person, association or community group" and, as such, are not necessarily sponsored by entities subject to ERISA. 29 C.F.R. § 29.2(g). Even when apprenticeship programs are sponsored by employers, they are not necessarily governed by ERISA for "neither on-the-job training nor classroom training paid for out of an employer's general assets is an ERISA plan." 29 C.F.R. § 2510.3(b)(3)(12). Thus, employers who pay for apprenticeship out of general assets have not created an employee benefit plan governed by ERISA.

Laws of "general applicability" usually have only a tenuous, remote, or peripheral connection with an ERISA-covered plan. *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, n.1 (1992). A law of "general applicability" is one applicable to a broader class than that at issue in a particular case.¹⁰ The apprentice prevailing wage rates at issue apply to all contractors and all apprentices irrespective of whether the apprenticeship program is subject to ERISA and, therefore, are laws of general applicability.

Many apprenticeship programs are provided through ERISA plans. However, the fact that employee benefit plans are a significant segment of a broader class covered by a law does not lessen the general applicability of the

¹⁰ *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), involved preemption under the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* The Court noted that, in that context, non-occupational safety laws which affected workers, such as traffic safety laws or fire safety laws, were laws of general applicability. *Id.* at 107. In *New York State v. United States*, 505 U.S. 144 (1992), a Tenth Amendment case, the Court indicated that laws that subjected states to the same standards as private parties were "generally applicable laws." *Id.* at 160.

law. Indeed, in *Travelers*, ERISA plans were a major source of private health care coverage, estimated by the Second Circuit to provide coverage to eighty-eight percent of the non-elderly population. *The Travelers Insurance Co. v. Cuomo*, 14 F.3d 708, 711 (2d Cir. 1994), *rev'd sub nom, New York State Conf. of Blue Cross and Blue Shield Plans v. The Travelers Insurance Co.*, 115 S. Ct. 1671 (1995). However, that did not transform a law that regulated health generally into a law which made reference to or was specifically directed toward ERISA plans. *Travelers*, 115 S. Ct. at 1676. For the same reason, the California regulation allowing a lower prevailing wage rate for registered apprentices is not preempted because it does not make reference to ERISA plans.

2. State Laws Which Encourage, But Do Not Require, Apprenticeship Programs to Be State-Approved, Do Not Relate To ERISA Plans.

Congress, in enacting the Fitzgerald Act, restricted the national policy on apprenticeship to voluntary stimulation and the states have followed suit. The use of apprenticeship as a training method is voluntary, adherence to the minimum standards for apprenticeship is voluntary, and the States' involvement in the Fitzgerald Act's cooperative federalism scheme for apprenticeship supervision is voluntary. Like the federal government, none of the *amici* States require that apprenticeship programs be registered in order to operate. However, as an incentive to submit to registration, certain privileges are offered by the States only to registered programs.¹¹

¹¹ For example, New York confers the following privileges: eligibility for local governmental financial aid, (N.Y. LAB. LAW § 816-a (McKinney 1989)); state responsibility for providing the related

One of these incentives is limiting the apprentice prevailing wage rate for apprentices on state public works to registered apprentice programs. The federal government offers the same incentive by a comparable exemption from the Davis-Bacon Act, the federal prevailing wage law. 40 U.S.C. § 276a - 276a(5) (1988).

Another incentive is found in the application of lower minimum wage rates. Several states permit the payment of less than minimum wages to persons registered in a state-approved apprenticeship program.¹²

(Footnote 11 cont.)

classroom instruction, (N.Y. LAB. LAW § 812 (McKinney 1989)); eligibility for a state certificate of completion to individuals who complete the program, (N.Y. COMP. CODES R. AND REGS. tit. 12 § 601.5(14) (1992)); access to the state forum for the resolution of disputes, (*Id.* at § 601.6(k) (1992)); and the ability of employers to pay less than prevailing wages to state registered apprentices on public work jobs. (N.Y. LAB. LAW § 220 (McKinney 1986)).

Washington mandates a progressively increasing wage scale, and offers the use of state services for resolution of disputes arising out of apprenticeship agreements, (WASH. REV. CODE § 49.04.050 (1994)); apprentices receive a substantial tuition cut (only pay 30%) for courses offered for the purpose of satisfying related or supplemental educational requirements, (WASH. ADMIN. CODE § 131-28-026 (1995)); electrical work can be performed without the requirement of a license or certification, (WASH. REV. CODE § 19.28.610 (1994)); while an apprentice attends supplemental and related instruction courses all workers compensation premiums are paid by the State Apprenticeship Council, (WASH. REV. CODE §§ 51.12.130, 51.16.140 and 51.32.073 (1994)); Washington also allows for payment of lower apprentice wage rates on public works contracts. (WASH. REV. CODE § 39.12.021 (1994)).

¹² See, N.Y. LAB. LAW § 651(5)(f) (McKinney 1988); WASH. REV. CODE § 49.46.060 (1994), WASH. ADMIN. CODE § 296-128-225 to 250, see also WASH. ADMIN. CODE § 296-128-005 to 040 (1995).

The Ninth Circuit found this scheme related to ERISA covered plans because it has the effect and possibly the aim of encouraging participation in one kind of ERISA plan - a state regulated one, over another, an unregulated one. *Dillingham*, 57 F.3d at 719 (citing *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir.), *cert. denied*, 113 S. Ct. 406 (1992)). The California apprenticeship law encourages participation in one kind of apprenticeship program over another, without regard to whether the program is an ERISA plan or not. The court in *Dillingham* ignored that this was equally true of the state regulatory scheme at issue in the *Travelers* case.

In *Travelers*, the lower courts found that the purpose of the hospital rate surcharges was to have health insurance customers, including ERISA plans, switch their coverage to Blue Cross. The scheme related to plans, according to these courts, because it purposefully interfered with the choices ERISA plans made. *Travelers*, 115 S. Ct. at 1675-76. Although this Court found that there was no evidence that all health insurance customers were, in fact, driven to Blue Cross, the Court accepted that the surcharges purposely had an indirect economic influence on the administrative and/or benefit structure choices made by ERISA plans. However, because such an influence did not dictate or restrict plan decisions, it did not relate to plans. 115 S. Ct. at 1675.

Apprentice exemptions from state prevailing wage laws operate in a similar fashion. The economic incentive the laws provide to registered apprenticeship programs may influence an apprenticeship program's decision whether or not to seek state approval, but it does not mandate any plan's choice.

Neither California nor any of the *amici* States require registration of apprenticeship programs. The apprentice exemption does not regulate what any apprentice, registered or not, is paid on private construction work or on federal public work jobs. It does not require the use of registered apprentices on state public work projects. Nor does it prohibit the use of unregistered apprentices on public work projects. It does not regulate an ERISA benefit plan or an apprentice program directly — it regulates a third party to the plan or program, the employer. Even if the apprenticeship program is provided through an ERISA benefit plan, it does not regulate any aspect of an ERISA plan because an employer's payment of wages is a "payroll practice" not covered by ERISA. See 29 C.F.R. § 2510.3-1(b)(1); *Massachusetts v. Morash*, 495 U.S. 107 (1989). Its only effect upon plans is that it may influence a plan's decision concerning whether it will agree to adhere to the Fitzgerald Act's minimum standards designed to assure the quality of the apprenticeship training provided.

Nor is the practical effect of the apprenticeship exemption to bind plan choice by effectively forcing plans to seek state registration. While the federal government and twenty-seven of the thirty-one states which have prevailing wage laws have such an exception, it is estimated that only fifty percent of apprentices in this country are in state or federally "approved" programs.¹³

¹³ See Employment and Training Administration, *Report on Project to Test the Feasibility of Developing Data on Non-Registered Apprentices By Occupation and Industry and By State Using Two Ongoing Statistical Programs*, Grant No. 21-51-78-22, United States Department of Labor (1978); Robert W. Glover, *Apprenticeship in America: An Assessment*, in the Proceedings of the Industrial Relations Research Association 27th Annual Meeting, 1974 p. 80, cited in New York, *Industrial Commissioners Determination On An Application For*

A contractor who chooses not to use registered apprentices has numerous options. First, contractors can bid on public work and forgo the use of any apprentices on such jobs. Many public work jobs are completed without the use of apprentice labor. Second, contractors can use non-registered apprentices on public work jobs and pay them full wages. Finally, contractors can restrict themselves to private construction where there are no prevailing wage requirements.¹⁴ The fact that apprenticeship programs can and do operate without subjecting themselves to state or federal minimum standards is ample evidence that apprentice exemptions from state prevailing wage laws operate merely as an economic influence on plan decisions and, consequently, are insufficiently related to ERISA plans to be preempted.

3. The State Approval Requirement Does Not Relate To The Administration Of Plans, It Merely Controls The Quality Of A Benefit Provided By Plans.

California's apprentice exemption has an even more remote and tenuous connection to ERISA plans than did the hospital rate regulation scheme in *Travelers*. In *Travelers*, the surcharges had an indirect economic influence on a

(Footnote 13 cont.)

Registration of An Apprentice Training Program By International Brotherhood of Teamsters Local 363, Joint Apprenticeship Committee, (May 27, 1980).

¹⁴ For example, in New York approximately half of all construction is not subject to state or federal prevailing wage requirements. F.W. Dodge Division, McGraw-Hill Information Systems, Inc. (1996).

plan's choice regarding the method of providing health care benefits. That choice of benefit structure and administration is what ERISA preemption is designed to protect from inconsistent regulation. In this case, however, the indirect economic influence of the apprentice exemption is not on a plan's decision whether to provide training benefits, but on whether to adhere to the Fitzgerald Act's minimum apprenticeship standards by seeking state registration.

Apprenticeship standards are designed to "safeguard the welfare of apprentices." 29 U.S.C. § 50. Thus, the state apprenticeship standards are quality control standards, "intended to insure that apprenticeship training programs developed and registered in accordance with the public policy are of the highest possible quality in all aspects of on-the-job training and related instruction and that all apprenticeship training programs provide meaningful employment and relevant training for all apprentices." N.Y. COMP. CODES R & REGS. tit. 12, § 601.1 (1992); WASH. ADMIN. CODE § 296-04-001 (1995). As such, they may relate to the quality of the benefit provided by the plan, but not to the plan's administration or choice of benefit structures. ERISA does not address in any manner a plan participant's interest in the quality of benefits provided by plans. Nor is this an area with which ERISA preemption is concerned. Thus, even if the practical effect of the apprentice exemption is to coerce plans to register with the state, which it is not, it does not relate to ERISA plans.

In *Fort Halifax Packing Co., Inc. v. Cognie*, 482 U.S. 1 (1986), this Court held that ERISA preempts state laws that relate to the administration of plans, not benefits. It described the purpose of preemption as protecting the uniform administration of plans.

An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.

Id. at 9.

Eligibility determinations, calculation of benefit levels, disbursements, and monitoring plan funds and records are administrative practices protected by ERISA's preemption provision. However, this Court has also made clear that not every practice or function performed by a plan administrator is relevant to preemption. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988).

Adhering to the Fitzgerald Act's apprenticeship standards does not affect the administration of the ERISA plan but rather the quality of the training, the benefit provided by the plan. The Fitzgerald Act's apprenticeship standards, which have been adopted by all the *amici* States with Apprenticeship Councils, require the following:

- (1) a written apprenticeship plan;
- (2) a minimum term of apprenticeship;
- (3) an outline of the work processes in which an

apprentice will receive supervised on-the-job training and an allocation of the time to be spent in each major process;

- (4) a minimum number of hours of related instruction;
- (5) a numeric ratio of journeymen to apprentices consistent with proper training;
- (6) a progressively increasing scale of wages;
- (7) periodic review of an apprentice's progress;
- (8) adequate and safe facilities for training; and
- (9) a certificate upon successful completion.

29 C.F.R. § 29.5. The only impact these quality control standards may have on the administration or benefit structure of an ERISA plan is the economic one of increasing the cost of providing the benefit. Thus, registered apprenticeship programs may be more costly than unregistered ones.

However, as this Court recognized in *Travelers*, that effect is not sufficient to relate to plans. In fact, in *Travelers* this Court specifically addressed quality control standards. Quality control standards set by the state in the area of hospital services indirectly effect the cost of providing benefits, but the common character of these regulations leaves the Congressional intent to preempt them even less likely. 115 S. Ct. 1679. The same is true in this case.

ERISA does not regulate the quality of benefits provided by plans, such as medical care, day care, legal services, or apprenticeship training. These are matters of traditional state concern. Thus, when an employer provides health care benefits, ERISA governs the administration of the plan, but the quality of the hospital services is still governed by state standards and the quality of medical care provided by professionals is still guided by

state medical malpractice standards. This is so even when the medical malpractice claim is against a health maintenance organization which, instead of paying for care received elsewhere, actually provides the medical care to the plan participants. See *Pacificare of Okla., Inc. v. Burrage*, 59 F.3d 151 (10th Cir. 1995); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3d Cir. 1995); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992).

Similarly, when an employer chooses to provide a prepaid legal services plan, ERISA may govern the administration of the plan, but the practice of law is still regulated by the states. Finally, when an employer provides on-site day care, the minimum sanitary, staffing and programmatic aspects of the benefit, the day care itself, are regulated by the state.

Indeed, the Fitzgerald Act's minimum apprenticeship standards are very comparable to state-imposed quality control standards for day care centers. For example, New York and Washington day care centers have a minimum staff-child ratio, N.Y. COMP. CODES R. & REGS. tit. 18, § 418.5(h) (1992); WASH. ADMIN. CODE § 388-150-190 (1995). The Fitzgerald Act standards require that apprenticeship programs have a minimum ratio of journeymen to apprentices. 29 C.F.R. § 29.5(b)(7). New York and Washington have minimum programmatic standards for child care which specify how often meals and rest periods must be provided, and require certain equipment and space be available. N.Y. COMP. CODES R. & REGS. tit. 18, §§ 418.10, 418.11(e), 418.11(m) (1992); WASH. ADMIN. CODE §§ 388-150-110, .140, and .240 (1995). The Fitzgerald Act standards require a minimum number of hours of on-the-job and related instruction and require that for each trade the content of the related instructions be specified. 29 C.F.R. § 5(b)(2), (4). In

New York and Washington, day care centers must have a written activity plan designed to meet the developmental needs of the child. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.12(a)(9) (1992); WASH. ADMIN. CODE § 388-150-100 (1995). The Fitzgerald Act standards require a written plan of apprenticeship embodying the terms of employment, training and supervision. 29 C.F.R. § 29.5(a). New York and Washington require day care centers periodically to report on the child's progress to parents. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.4(c)(26) (1992); WASH. ADMIN. CODE § 388-150-170 (1995). The Fitzgerald Act standards also require periodic evaluation and review of an apprentice's progress. 29 C.F.R. § 29.5(b)(6). New York and Washington impose safety standards on day care centers. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.2 (1992); WASH. ADMIN. CODE § 388-150-280 (1995). The Fitzgerald Act standards also impose safety standards on apprenticeship programs. 29 C.F.R. § 29.5(b)(9).

These type of requirements also are similar to the state regulation of the quality of health care, another benefit often provided by plans. Thus, New York and Washington impose quality control standards on hospitals, regulate the training of doctors and medical support personnel, and set medical malpractice standards. N.Y. COMP. CODES R. & REGS. tit. 10, Part 405, § 405.4 (1989); Title 18, Business and Professions, WASH. REV. CODE (1994); Title 70, Public Health and Safety, WASH. REV. CODE (1994); Ch. 43.70 and Ch. 43.20 WASH. REV. CODE (1994).

In most instances these quality control standards are not applied directly to plans. The plans simply pay for the medical, legal, or day care services. However, when benefits are provided in-kind by a plan, such as when

employers provide day care on the work site, provide prepaid legal services through the staff model, operate their own medical facility, or provide on-the-job apprenticeship training, the quality control regulations may be applied more directly to plan activities. Even so, they relate only to the quality of the benefit provided, not to the administration of the plan and are not preempted. Any other result would deny the states the right to regulate on-site day care, infectious waste control at plan owned medical centers, and the quality of care provided by health maintenance organization employed doctors.

Congress did not intend to preempt state regulation of apprenticeship training standards or wages on state public works, or any of these related areas of regulation traditionally occupied by state law.¹⁵

¹⁵ If, contrary to what we have argued, California's statutory scheme is found to "relate to" ERISA plans within the meaning of ERISA § 514(a), the Court would then have to consider whether the California statutory scheme is saved from ERISA preemption by ERISA § 514(d). This section provides, in pertinent part, that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any of the laws of the United States ... or any rule or regulation issued under such law." 29 U.S.C. § 1144(d). The role of the States in the promotion, provision and enforcement of minimum apprenticeship standards is integral to the fulfillment of the Fitzgerald Act's mandate. We therefore embrace the position of petitioners and other supporting amici on the savings clause issue.

III. CONCLUSION

ERISA preemption of state laws allowing sub-journey prevailing wage rates for apprentices in state-approved apprenticeship programs will significantly impair the longstanding federal-state cooperative effort in the formulation, promotion, and enforcement of quality apprenticeship programs and standards and the respective prevailing wage laws of the *amici* States. Under this Court's decision in *Travelers*, state laws which use economic incentives to encourage quality control standards do not relate to ERISA covered benefit plans. State laws allowing sub-journey prevailing wage rates for apprentices in state approved programs encourage, but do not require, apprenticeship programs to be state-approved. Furthermore, the state approval requirement does not relate to the administration of plans; it merely controls the quality of a benefit provided by plans. For these reasons, such laws do not relate to ERISA benefit plans and the Ninth Circuit's decision should be reversed.

DATED this 17th day of June, 1996.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

LYNN D.W. HENDRICKSON
*JEFF B. KRAY
Assistant Attorneys General

*Counsel of Record
P.O. Box 40121
Olympia, Washington 98504-0121
(360) 459-6571

DENNIS C. VACCO
Attorney General
State of New York

VICTORIA A. GRAFFEO
Solicitor General

DANIEL F. DE VITA
M. PATRICIA SMITH
Assistant Attorneys General

Dept. of Law - Labor Bureau
120 Broadway
New York, NY 10271
(212) 416-8707

APPENDIX

TABLE IV-1
Existence of Prevailing Wage Laws, by State

States Having Prevailing Wage Laws	Date of Law	States Without Prevailing Wage Laws		
		States With Repealed Laws	Date of Law	Date of Repeal
Alaska	1931	Georgia		
Arkansas	1955	Iowa		
California	1931	Mississippi		
Connecticut	1935	North Carolina		
Delaware	1962	North Dakota		
District of Columbia	1931	South Carolina		
Hawaii	1955	South Dakota		
Illinois	1931	Vermont		
Indiana	1935	Virginia		
*Kansas	1891			
Kentucky	1982			
Louisiana	1968			
Maine	1933			
Maryland	1945			
Massachusetts	1914			
Michigan	1965			
Minnesota	1973			
Missouri	1957			
Montana	1931	Alabama	1969	1981
Nebraska	1923	Arizona	1912	1984
Nevada	1937	Colorado	1933	1985
New Jersey	1913	Florida	1933	1979
New Mexico	1937	Idaho	1911	1985
New York	1897	New Hampshire	1941	1985
Ohio	1931	Utah	1933	1981
Oklahoma	1965			
Oregon	1959			
Pennsylvania	1961			
Rhode Island	1935			
Tennessee	1953			
Texas	1933			
Washington	1945			
West Virginia	1933			
Wisconsin	1931			
Wyoming	1967			

* Kansas repealed its prevailing wage law in 1987.

Source: Individual state laws and Wharton Industrial Research Unit survey, state departments of labor, 1982.

No. 95-789

Supreme Court, U. S.
F I L E D

JUN 17 1996

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CLERK

STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS; COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.;
MANUAL J. ARECO, DBA SOUND SYSTEMS MEDIA,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE
AMERICAN ASSOCIATION OF RETIRED PERSONS
AND THE NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION IN SUPPORT OF NEITHER PARTY

DANIEL FEINBERG
SIGMAN, LEWIS & FEINBERG
405 FOURTEENTH STREET
SUITE 1100
OAKLAND, CA 94612
(510) 839-6824

Counsel for *Amicus Curiae*
National Employment Lawyers
Association

MARY ELLEN SIGNORILLE
(Counsel of Record)
CATHY VENTRELL-MONSEES
MELVIN RADOWITZ
AMERICAN ASSOCIATION OF
RETIRED PERSONS
601 E STREET, NW
WASHINGTON, DC 20049
(202) 434-2070

Counsel for *Amicus Curiae*
American Association of
Retired Persons

20pp

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IN THE
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STATE OF CALIFORNIA, DIVISION OF LABOR
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**BRIEF AMICI CURIAE OF THE
AMERICAN ASSOCIATION OF RETIRED PERSONS
AND THE NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION IN SUPPORT OF NEITHER PARTY**

INTEREST OF AMICI CURIAE

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 33 million persons, age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and purpose. As a method of promoting independence, AARP attempts to foster the economic security of individuals as they age by seeking to

increase the availability, security, equity, and adequacy of private and public pension plans. In 1993, AARP established its Pension Equity Project to advocate for security and equity in retirement benefits and to educate the public about the need for greater safeguards in the pension system.

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of approximately 2,800 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation affecting the rights of individuals in the workplace.

AARP and NELA are qualified to brief the Court on the implications of the decision in this case, having participated as *amici curiae* in numerous cases involving ERISA and other employment laws, including, among others, the cases of *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), and the leading decision on ERISA benefit claims, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

AARP's members, NELA members' clients, and other older Americans depend on ERISA to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq.* Contrary to its purpose, a statute that was designed to safeguard employee benefits has, all too frequently, been used to deprive employees of rights they previously enjoyed under state law while failing to provide any comparable federal remedy. The proliferation of ERISA preemption cases raises the question of whether ERISA is having an effect contrary to that intended by those who favored its adoption. Indeed, ERISA preemption is

often used as a sword instead of a shield.^{1/}

This case presents the Court with the opportunity to establish a precise test for determining the boundaries of the phrase "relates to an employee benefit plan" in ERISA's preemption clause. The decision in this case will have a direct and vital bearing on the economic security of AARP's members, NELA members' clients and other older Americans. In light of the significance of the issues presented by this case, AARP and NELA respectfully submit this brief *amici curiae*.^{2/}

SUMMARY OF ARGUMENT

The number of cases this Court has decided construing the phrase "relates to an employee benefit plan" in ERISA's preemption clause illustrates the lower courts' struggle in defining the limits of "relates to."^{3/} As the Court has recognized, this clause is not a model of legislative drafting, and it has been difficult to provide clear guidance to the lower courts for demarcation of the limits of

^{1/} See *Rokohl v. Texaco*, 77 F.3d 126, 130 (5th Cir. 1996) ("an employer may not use its ERISA plan as a 'gimmick' to trigger preemption and thereby avoid litigation in state court. In the classic metaphor, ERISA preemption may be used as a shield but not as a sword." (citations omitted)).

^{2/} The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

^{3/} E.g., *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers' Insurance Co.*, 115 S. Ct. 1671 (1995); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1988); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

this clause.^{4/} Hence, not only has development of a uniform common law on ERISA preemption been frustrated, but the courts have been flooded with these cases.

AARP and NELA suggest that the Court adopt the Ninth Circuit's test in *General American Life Ins. Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993), for defining when a state law "relates to an employee benefit plan."^{5/} This test determines whether a state law relates to an employee benefit plan by asking whether the state law encroaches on the relationships regulated by ERISA. *Id.* at 1521-22. The *Castonguay* test serves to develop more uniformity in the interpretation of the phrase "relates to an employee benefit plan," to promote Congress' intent in passing ERISA's preemption clause and to decrease the number of preemption cases flowing into the courts.

^{4/} *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers' Insurance Co.*, 115 S. Ct. 1671 (1995).

^{5/} ERISA preemption analysis involves numerous steps. The initial inquiries under ERISA § 514(a) are whether a State, state law and an employee benefit plan are involved. ERISA §§ 514(c)(1) & (c)(2), 29 U.S.C. §§ 1144(c)(1) & (c)(2). See *Massachusetts v. Morash*, 490 U.S. 107 (1989) (vacation payments from an employer's general assets did not constitute a plan and therefore state law cannot be preempted); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (a state law requiring a one-time severance payment was not preempted because there was no plan due to a lack of an ongoing scheme or administrative structure). Although *amici*'s brief is limited to the issue of a test for the meaning of "relates to," *amici* recognize that ERISA preemption analysis does not end after it is determined that a state law relates to an employee benefit plan. In this case, if it is determined that the state law relates to a plan, then it must be determined whether a "savings clause" applies to prevent preemption. See ERISA §§ 514(b) & (d), 29 U.S.C. §§ 1144(b) & (d).

Under this test, the California state law on apprenticeship standards "relates to an employee benefit plan" because the law regulates the level of benefits that participants will receive and for which participating employers are obligated. Consequently, this state law is preempted under ERISA § 514(a), 29 U.S.C. § 1144(a), unless a savings clause applies to prevent preemption.

ARGUMENT

I. THE COURT SHOULD DEVELOP A MORE PRECISE TEST FOR DETERMINING WHEN A STATE LAW "RELATES TO AN EMPLOYEE BENEFIT PLAN" SO THAT ERISA'S PREEMPTION CLAUSE WILL BE UNIFORMLY APPLIED.

The Court has recognized that Congress intended federal courts to develop federal common law in interpreting ERISA. *Variety Corp. v. Howe*, 116 S. Ct. 1065, 1070 (1996) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989)). And, the Court has done so in the area of ERISA preemption.^{6/} However, the lower courts are still struggling with the boundaries of ERISA's preemption clause, particularly with the meaning of the

^{6/} E.g., *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers' Insurance Co.*, 115 S. Ct. 1671 (1995); *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86 (1993); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Massachusetts v. Morash*, 490 U.S. 107 (1989); *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1988); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

phrase "relates to an employee benefit plan."²¹ Indeed, this Court recently acknowledged that its attempts to provide detailed guidance concerning ERISA preemption have been inadequate, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.* ("Travelers"), 115 S. Ct. 1671, 1676 (1995), mainly because ERISA's preemption clause is not a "model of legislative drafting and the legislative history . . . is sparse." *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86 (1993) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (quoting *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985))).

This Court's own experience with ERISA preemption illustrates the lower courts' struggle. In fact, this court has issued sixteen decisions on this issue, even though ERISA has only been in effect for twenty-one years. More than one-third of the cases which the Court has decided concerning ERISA have been preemption cases. Significantly, the federal courts are being inundated with unwarranted preemption defenses in cases which have little to do with furthering Congress' intent of uniform administration of employee benefit plans.

This torrent of cases is due to the vague statutory language concerning the limits of ERISA's preemption clause as well as the perception that ERISA preemption can be used as both a sword and a shield to prevent participants from pursuing *bona fide* claims. See *Rokohl v. Texaco*, 77 F.3d 126, 130 (5th Cir. 1996). ERISA's muddled language has

²¹ See *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 135 n.3 (1992) (Steven, J., dissenting) (noting that in December 1992, there were 2800 cases on LEXIS addressing ERISA preemption); *HealthAmerica v. Menton*, 555 So. 2d 235, 241 (Ala. 1989), cert. denied, 493 U.S. 1093 (1990) (White and O'Connor, JJ., dissenting to denial of certiorari); see generally S. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 18 n. 42 (1995) (detailing the volume of cases and law review articles on ERISA preemption).

resulted in a lack of uniformity on this issue, certainly undercutting Congress' objective in obtaining nationally uniform administration of employee benefits plan. *Travelers*, 115 S. Ct. at 1677-78. In order to provide more uniformity in the application of ERISA's preemption clause and to decrease the number of cases on preemption issues in the federal courts, *amici* respectfully suggest the adoption of a precise test for determining when a state law "relates to an employee benefit plan."

II. A STATE LAW "RELATES TO AN EMPLOYEE BENEFIT PLAN" WHEN IT REGULATES THE PRINCIPAL RELATIONSHIPS THAT ERISA REGULATES.

A. State Law Is Not Preempted Unless Congress' Intent To Do So is Clear.

ERISA preemption analysis is no different than any other preemption analysis.²² *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86 (1993) ("we discern no solid basis for believing that, Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis"). Accordingly, "the purpose of Congress is the ultimate touchstone of preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))).

"To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133,

²² As with other statutes, the Court has cautioned that, in order to avoid unintentionally encroaching on state authority, courts should be reluctant to find preemption when interpreting a federal statute. U.S. CONST. art. VI, cl. 2; *Travelers* at 1676; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("the historic police powers of the State [are] not to be superseded by . . . [federal law]").

138 (1990). Congress' intent as to ERISA's preemptive effect is explicitly stated in the statutory language of ERISA § 514(a), 29 U.S.C. § 1144(a). Section 514(a) states that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the statute.^{2/}

In *Shaw*, the Court explained that state law relates to an employee benefit plan "if it has a connection with or reference to such a plan." *Travelers*, 115 S.Ct. at 1677 (quoting *Shaw*, 463 U.S. at 96-97).^{10/} Nevertheless, the Court admonished that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100, n. 21. It follows that "relates to" must have some limitation, otherwise it has no meaning. *Travelers*, 115 S. Ct. at 1677. To hold otherwise would be inconsistent with the presumption that Congress does not intend to preempt state law, and that state law must be given the fullest effect possible. *Travelers*, 115 S. Ct. at 1676-78; *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 841 (1988).

^{2/} Congress also provided that ERISA will not preempt any state criminal law or any state law regulating insurance, banking or securities, as long as an employee benefit plan is not deemed to be in the business of insurance. ERISA § 514(b)(2), 29 U.S.C. § 1144(b)(2). In addition, Congress provided that ERISA shall not alter, supersede or modify any other federal law. ERISA § 514(d), 29 U.S.C. § 1144(d). This brief will not address statutory provisions.

^{10/} State laws that specifically reference ERISA plans are preempted to the extent they regulate ERISA plans. See, e.g., *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992) (striking down District of Columbia law that "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted"); *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1988) (a garnishment statute singling out ERISA plans for special treatment was held preempted, but the general garnishment statute was not preempted as applied to ERISA plans).

The Court reviewed ERISA's structure and purpose to determine the purpose of the preemption clause and the limits of "relates to." *Travelers*, 115 S. Ct. at 1677-78. The Court concluded that "the basic thrust of the preemption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* However, the Court did not set forth a test or standard to apply its conclusion to the meaning of "relates to." Consequently, this case presents the Court with the opportunity to establish a precise test for determining the boundaries of the phrase "relates to an employee benefit plan" in ERISA's preemption clause.

B. Whether A State Law Regulates A Principal Relationship Already Regulated By ERISA Is A Test That Defines The Boundaries of "Relates To An Employee Benefit Plan."

In order to readily determine the boundaries of "relates to" given Congress' purpose for enacting the preemption clause, *amici* suggest a test for analyzing the state law by determining whether the relationships regulated by the state law are also regulated by ERISA. Judge Kozinski, writing for the Ninth Circuit in *General American Life Ins. Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993), explained this test:

To determine whether a state law is preempted we must look at whether it encroaches on the relationships regulated by ERISA. State tort and contract causes of action, for instance, don't apply to transactions between plans and their participants, because the relationship between plan and participant is, under ERISA, a matter of exclusively federal concern. Wrongful discharge laws don't apply to employee terminations carried out to avoid

benefit payments, because the employer-employee relationship is -- insofar as it deals with benefit plans -- also an exclusively federal matter. State law can, however, apply to transactions between plans and their creditors or their landlords or their own employees, because those relationships are outside ERISA's purview.

Id. at 1522 (citations omitted). The practical effect is that ERISA will preempt claims where ERISA comprehensively regulates the principal ERISA relationships.^{11/}

Judge Kozinski's rationale for this test flows not only from ERISA's statutory language and its purpose, but also from his understanding of federal jurisprudence.

The key to distinguishing between what ERISA preempts and what it does not lies, we believe, in recognizing that the statute comprehensively regulates certain relationships: for instance, the relationship between plan and plan member, between plan and employer, between employer and employee (to the extent an employee benefit plan is involved, and between plan and trustee. Because of ERISA's explicit language, and because state laws regulating these relationships (or the obligations flowing

^{11/} Accord, *Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236, 249 (5th Cir. 1990); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises*, 793 F.2d 1456, 1467-68 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987); *Lordmann Enterprises, Inc. v. Equicor, Inc.*, 32 F.3d 1529, 1533-34 (11th Cir. 1994), cert. denied, 116 S. Ct. 335 (1995). The Eighth Circuit uses the ERISA principal entity test as one of several factors in determining whether a state law "relates to" a plan. *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital, Inc.*, 947 F.2d 1341, 1344-45 (8th Cir. 1991), cert. denied, 504 U.S. 957 (1992).

from these relationships) are particularly likely to interfere with ERISA's scheme, these laws are presumptively preempted.

But ERISA doesn't purport to regulate those relationships where a plan operates just like any other commercial entity -- for instance, the relationship between the plan and its own employees, or the plan and its insurers or creditors, or the plan and the landlords from whom it leases office space. State law is allowed to govern these relationships, because it's much less likely to disrupt the ERISA scheme than in other situations. Moreover, if these relationships were governed by federal law, federal courts would have to invent a federal common law of contracts, tort, property, corporation -- something that would run against the grain of our federal system.

Id. at 1521-22 (citations and footnotes omitted).

The *Castonguay* test is consistent with the Court's admonition in *Shaw* because when a state law concerns a third party and does not regulate any of the principal ERISA relationships, the effect on employee benefit plans will be too tenuous or peripheral to find that it relates to a plan. Moreover, this test is also consistent with Congress' objective to avoid multiplicity of regulation; obviously if state law does not regulate any of the principal ERISA relationships, there will not be duplicative regulation. *Travelers*, 115 S. Ct. at 1677-78. As a corollary, this test is consistent with the presumption that Congress does not intend to preempt state laws unless Congress' intent to do so is clear. *Id.*

The *Castonguay* test will plainly encompass areas of traditional ERISA concern: laws that regulate the types of benefits or terms of a plan; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (claim for improper processing of benefits claims is preempted); laws that create specific

requirements as to funding reporting and disclosure, vesting, etc.; laws that establish rules for the calculation of benefits; *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (interference with calculation of benefits through state antistatutory statute); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (prohibition of offset of workers' compensation benefits against retirement benefits preempted); and laws and common law rules providing for remedies for misconduct growing out of the administration of the plan, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). These are examples of state laws that regulated the relationships between ERISA principals that are also comprehensively regulated by ERISA -- in these cases, plan members and the plan.

In order to determine whether a state law relates to an employee benefit plan, the *Castonguay* test asks whether the state law reaches a relationship already regulated by ERISA. *General American Life Ins. Co. v. Castonguay*, 984 F.2d at 1521-22. Accordingly, claims made against an employer in its corporate, rather than its fiduciary capacity, would not relate to employee benefit plans and would not be preempted. *Cf. Akers v. Palmer*, 71 F.3d 226 (6th Cir. 1995) (decision to terminate plan is made in corporate capacity and thus claims are not preempted). A state law requiring a hospital to collect a surcharge from a participant would not be preempted because it regulates the hospital (not an ERISA principal) and the participants. *Travelers*, 115 S. Ct. at 1680. Claims for medical malpractice against doctors would not be preempted because the doctor is not one of the principal ERISA entities. *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995). A successful wrongful discharge claim under a whistleblower statute which includes payments to an ERISA fund as part of the "back-pay" remedy would not be preempted because the statutory remedy regulates the employment relationship between the employer and employee. *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989).

C. **California's State Law On Apprenticeship Standards Regulates Principal Relationships Regulated By ERISA And Therefore "Relates To An Employee Benefit Plan."**

California's state law on apprenticeship standards regulates two of the key ERISA principal relationships: the relationship between a plan^{12/} and the participant, and the relationship between the plan and the participating employer.

California's law regulates the types and level of benefits the participants (or apprentices) will receive. California's law also orders the participating employer to make contributions to the apprenticeship program, and details the amount and basis of the contributions. Quite simply, California's law directly regulates the level of benefits that participants will receive and for which participating employers are obligated.

Under the *Castonguay* test, the California state law on apprenticeship standards relates to an employee benefit plan under ERISA § 514(a), and is preempted by ERISA, unless the savings clause applies.

^{12/} For purposes of this brief, *amici* assume, without argument, that the joint apprenticeship training committee is an apprenticeship program within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1). See n. 5, *supra*.

CONCLUSION

For the foregoing reasons, AARP and NELA urge the Court to affirm the decision of the Ninth Circuit Court of Appeals on the issue of whether the California state law on apprenticeship standards relates to an employee benefit plan.

Respectfully submitted,

Daniel Feinberg
Sigman, Lewis & Feinberg
405 Fourteenth Street
Suite 1100
Oakland, CA 94612
(510) 839-6824

Mary Ellen Signorille
(Counsel of Record)
Cathy Ventrell-Monsees
Melvin Radowitz
American Association of
Retired Persons
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2070

Counsel for *Amicus Curiae*

Counsel for *Amicus Curiae*

National Employment
Lawyers Association

American Association of
Retired Persons

June 17, 1996

JUN 17 1996

CLERK

No. 95-789

**In The
SUPREME COURT of the UNITED STATES**
October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS; COUNTY OF SONOMA,
Petitioners,

v.

DILLINGHAM CONSTRUCTION,
N.A., INC.; MANUEL J. ARCEO,
dba SOUND SYSTEMS MEDIA,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF *AMICUS CURIAE* THE NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION, INC.
IN SUPPORT OF PETITIONERS**

Gary L. Lieber
Counsel of Record
Scott Robins
SCHMELTZER, APTAKER
& SHEPARD, P.C.
2600 Virginia Avenue, N.W.
Suite 1000
Washington, D.C. 20037-1905
(202) 333-8800

Attorneys for *Amicus Curiae*
The National Electrical
Contractors Association, Inc.

June 17, 1996

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**BRIEF OF *AMICUS CURIAE* THE NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
INC. IN SUPPORT OF PETITIONERS**

This brief in support of petitioners is submitted in accordance with Rule 37 of the Rules of this Court. Pursuant to Rule 37.3, the National Electrical Contractors Association, Inc. ("NECA") has obtained and has filed herewith the written consent of the petitioners and the respondents to the submission of this brief.

INTEREST OF AMICUS CURIAE

NECA is a construction trade association composed of approximately 4,000 electrical contractors served through 119 chapters in the United States chartered by and affiliated with the National Association. The primary purpose of these chapters is to act as multiemployer bargaining agents for the negotiation and administration of collective bargaining agreements on behalf of electrical contractors who authorize the local chapters to act as their collective bargaining agent with local unions. In all, NECA chapters represent approximately 17,000 contractors in collective bargaining, all of whom help support apprenticeship training since, typically, these local collective bargaining agreements contain provisions authorizing joint apprenticeship and training committees. Those committees, in turn, establish and set rules and policies governing the operation of apprenticeship programs in compliance with standards set by the National Joint Apprenticeship and Training Committee for the Electrical Industry ("NJATC"). NECA and the International Brotherhood of Electrical Workers jointly sponsor the NJATC which provides guidance, educational assistance and standardized curriculums to local joint apprenticeship programs in a wide variety of related program activities. Local apprenticeship programs authorized under these collective bargaining agreements currently enroll approximately 23,000 apprentices. Consequently, NECA has a vital stake in proper regulation of apprenticeship programs.

Petitioners seek to reverse the decision of the Ninth Circuit Court of Appeals holding that Section 1777.5 of the California Labor Code is preempted by the Employee Retirement Income Security Act ("ERISA"). The specific effect of that decision is to preempt enforcement of a law that allows a lower wage for registered apprentices on state public works projects

only in a particular circumstance, i.e., as participants in apprenticeship programs approved by a state agency enforcing minimum standards as part of the cooperative state-Federal effort under the National Apprenticeship Act, 29 U.S.C. § 50 (also referred to as the "Fitzgerald Act"). The impact of the decision is much broader. Without a requirement allowing a lower apprenticeship wage to be paid only when the apprentice is participating in an approved apprenticeship program, there is little incentive for contractors to utilize approved apprenticeship training programs. Instead, contractors will be free to utilize apprentices from programs that are not subject to standards or are subject to minimal standards since ERISA itself does not regulate the content and substance of apprenticeship programs. The growth and proliferation of these unapproved programs spell the decline of quality apprenticeship training since these unapproved programs will ultimately provide apprentices with inadequate supervision and substandard educational opportunities.

At issue is whether states are allowed to maintain regulation of apprenticeship plans as part of a coordinated state-Federal relationship under the Fitzgerald Act, and whether they are able to encourage contractor utilization of such regulated plans through favorable prevailing wage laws on state projects. NECA and its member contractors are committed to trade apprenticeship that is more than simply a device to pay beginning workers lower wages. Instead, apprenticeship must include quality training and education as anticipated by the Fitzgerald Act and carried out through a Federal and state partnership. One of the primary motivations for the adoption of Federal and state prevailing wage laws along with the Fitzgerald Act was the recognition that quality training is necessary for the health of the construction industry and to encourage legitimate

apprenticeship programs on public works projects to meet that end. It is NECA's contention that the Fitzgerald Act is a vital and important Federal law and should remain such. To mistakenly hold that state laws enacted as part of the Fitzgerald Act apprenticeship scheme are preempted by ERISA vitiates the Act as well as the quality of apprenticeship training throughout the country.

SUMMARY OF ARGUMENT

Among the purposes of the Fitzgerald Act expressly set forth in its text is to promote apprenticeship standards and to foster cooperation with state agencies engaged in formulating such standards. To this end, regulations promulgated by the Department of Labor set forth standards for apprenticeship programs on Federal projects as well as standards for the approval of such programs by state apprenticeship agencies as part of the joint effort authorized under the Fitzgerald Act. Approved programs must conform to certain standards with regard to the degree of supervision and the education and training provided apprentices. State prevailing wage laws permit the payment of lower wages to apprentices working on state public works projects if the apprentices participate in state-approved programs. If they do not participate in state-approved programs, the lower apprenticeship wage may not be used. Consequently, the incentive of being able to pay lower wages to apprentices encourages contractors to utilize apprentices from approved programs thereby maintaining the minimum standards for apprenticeship welfare and training adopted and furthered by approved programs.

The preemption clause of ERISA is far-reaching in scope. However, this preemption clause is not without certain conditions. ERISA contains a "savings clause" which prevents the impairment and restriction of other Federal laws by ERISA.

The savings clause of ERISA prevents the preemption of the California prevailing wage statute at issue as well as all such similar statutes. If states are not able to enact and enforce their own prevailing wage laws that encourage and promote minimum apprenticeship standards adopted by the states, the fundamental

purpose of the Fitzgerald Act will be severely limited. The Fitzgerald Act is not an exclusive Federal concern. The vitality of the Act depends on state involvement and state participation in apprenticeship regulation. Therefore, the Ninth Circuit's conclusion that Federal law is not impaired to the extent that ERISA preempts the enforcement of the California prevailing wage law is erroneous and cannot be sustained.

ARGUMENT

THE CALIFORNIA PREVAILING WAGE LAW AT ISSUE IS NECESSARY TO FITZGERALD ACT APPRENTICESHIP REGULATION AND IS, THEREFORE, SAVED FROM ERISA PREEMPTION UNDER SECTION 514(d).

ERISA, 29 U.S.C. § 1001 *et seq.*, is a comprehensive statute regulating the provision of benefits by employers to employees. It was the intention of Congress to create uniformity of law with respect to employee benefit plans. Consequently, Section 514 of ERISA preempts all state laws "relating to" employee benefit plans. ERISA § 514, 29 U.S.C. § 1144. Certain conditions, however, were imposed on the preemption provisions of Section 514. Subsection (d) of Section 514 provides that "nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." ERISA § 514 (d), 29 U.S.C. § 1144(d). Thus, the broad sweep of ERISA was not meant to diminish other Federal laws.

Preemption of laws such as the California prevailing wage law at issue would result in just such an impairment. Preemption impairs the cooperative state jurisdiction over apprenticeship programs envisioned by the Fitzgerald Act. *See Minn. Chapter of Assoc. Builders & Contractors v. Minn. Dept. of Labor & Indus.*, 47 F.3d 975, 980, *reh'g en banc denied*, 1995 U.S. App. LEXIS 7588 (8th Cir. 1995). The Fitzgerald Act, 29 U.S.C. § 50, which was adopted by Congress in 1937, provides, in relevant part:

[t]he Secretary of Labor is authorized and directed to *formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices*, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, *to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship* . . .

29 U.S.C. § 50 [emphasis added].

States are an important participant in the Fitzgerald Act process beyond that evident by the language of the Act itself. They are key players in the regulatory scheme promulgated by the Department of Labor. These regulations set forth minimum standards for apprenticeship programs as a prerequisite for approval "for various Federal purposes"¹ by either the Bureau of Apprenticeship Training ("BAT") or a state apprenticeship agency recognized by BAT. See 29 C.F.R. § 29.5 (1995). The state apprenticeship agency providing such approval must also meet certain standards in order to be recognized by BAT and be

¹ The regulations define "Federal purposes" as including any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship. 29 C.F.R. § 29.2 (k).

able to approve an apprenticeship program. See 29 C.F.R. § 29.12 (1995).

The active -- and integral -- role of approval and regulation expected of the states under the Fitzgerald Act is also borne out by its history. In a joint letter to the Subcommittee on Appropriations for the Department of Labor, dated March 1, 1937, in support of the bill adopting the Fitzgerald Act, the Department of Labor and Office of Education stated:

It has been amply demonstrated that the responsibilities in connection with the apprentice as an employed worker *can best be carried on by the State labor department* which is charged with the general responsibility of improving working conditions and fostering the well-being of the workers, and that the responsibilities in connection with the apprentice as a student *can best be performed by the State board for vocational education*. These State agencies in turn look to the United States Department of Labor and to the United States Office of Education for leadership and research and for the determination of national standards in their respective fields.

H. R. Rep. No. 945, 75th Cong. 1st Sess., at 5-6 (1937) [emphasis added]. Therefore, before and at the inception of the Act, it was recognized by the Federal agencies responsible for implementing the Act that the enforcement scheme necessary for adequate regulation of apprenticeship programs was a *joint* program involving participation by the states.

The Ninth Circuit's holding that Section 514 (d) of ERISA does not save the California prevailing wage law from preemption is based upon an overly narrow reading of both the Savings Clause and the Fitzgerald Act. This reading is predicated on the conclusion that the Fitzgerald Act does not depend upon states to enforce its provisions and "in fact, there is nothing in the [Fitzgerald Act] for the states to enforce." *Dillingham Const. N.A. Inc. v. County of Sonoma*, 57 F.3d 712, 721 (9th Cir. 1995), *cert. granted*, ___ U.S. ___, 116 S. Ct. 1416 (1996), (quoting *National Elevator Industry, Inc. v. Calhoun*, 957 F.2d 1555, 1562 (10th Cir.), *cert. denied*, 506 U.S. 753, 113 S. Ct. 406, 121 L.Ed 331 (1992)). However, it is erroneous to conclude that an act such as the Fitzgerald Act can only be impaired for purposes of the Savings Clause by interference with state enforcement of a Federal law.²

The state role anticipated by the Fitzgerald Act -- and, ultimately, the creation of minimum standards for the welfare of apprentices -- cannot be achieved if laws such as the California

² The Ninth Circuit relies on this Court's opinion in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98, 103 S. Ct. 2890, 2900-01, 77 L.Ed.2d 490 (1983), for the proposition that, even if application of the California statute in issue furthers the objectives of the Fitzgerald Act, it is not an enforcement mechanism of Federal law, and to the extent that its enforcement is preempted, Federal law is not impaired. *Dillingham*, 57 F.3d at 721. However, the plain language of Section 514(d) prohibits ERISA impairment of *any* Federal law and, on its face, cannot be said to allow preemption of a state law that is intricately entwined and serves the purpose of a Federal law without explicitly enforcing the Federal law.

prevailing wage law at issue are preempted by ERISA. Under the Ninth Circuit view, as a practical matter, states would be limited to their role under the Department of Labor regulations, i.e., approving and enforcing apprenticeship standards on Federal projects and registering apprenticeship programs for this purpose. Federal projects, however, are not the universe of projects employing apprentices. Laws such as the California prevailing wage law at issue allow states to promote and mandate the minimum apprenticeship standards fostered by the Fitzgerald Act through the most effective means possible -- permission to pay a lower wage for apprentices enrolled in approved programs which provide adequate supervision, legitimate standardized curriculums, and minimum safety standards. This extends minimum apprenticeship standards beyond the Federal domain -- a result surely anticipated by the Fitzgerald Act.

The impairment of the Fitzgerald Act through preemption of the state role in apprenticeship regulation is evident by examining the consequences of limiting the state role in apprenticeship regulation and negating laws such as Section 1777.5 of the California Labor Code. Apprenticeship training is not an endeavor that can be implemented in a disorganized or haphazard manner. Approved programs require certain training ratios between apprentices and supervisors which assure that apprentices receive necessary supervision. Legitimate standardized curriculums used by such programs provide apprentices with the knowledge base to perform quality work. Without the ability to encourage participation in approved programs -- i.e., programs meeting minimum standards -- by allowing a lower wage for apprentices, many contractors will choose the option of utilizing apprentices on state projects from unapproved programs. These programs will undoubtedly not have sufficient training standards -- including necessary safety

training -- and sufficient ratios of journeymen to apprentices that provide apprentices with adequate supervision. They also will not provide the education that is an integral part of apprenticeship. Without appropriate state regulation, apprenticeship programs may be set up on an *ad hoc* basis for the single project solely to take advantage of the lower wage. In order to compete, legitimate contractors would feel economically pressured to follow the same route -- i.e., abandon existing approved apprenticeship programs diminishing the overall quality of apprenticeship training as these approved programs suffer economic decline.

This scenario will take place if the Ninth Circuit's holding is allowed to stand. The Fitzgerald Act, which contemplates a Federal-state partnership, would be crippled. ERISA itself does not fill the void, as it does *not* regulate the context or substance of apprenticeship programs -- it only contains certain fiduciary and reporting requirements. See generally, ERISA §§ 101-414, 29 U.S.C. §§ 1001-1114. A key component of Federal Davis-Bacon projects³ would remain a lower wage for apprentices as long as apprentices are enrolled in an approved apprenticeship program. However, state regulation of apprenticeship standards as contemplated by the Fitzgerald Act will cease to exist. A contractor will be able to self-designate apprentices. The only alternative to this "system" would be the decision by states requiring that all workers be paid as journeymen on state projects, which would effectively prohibit the use of apprentices. This, of course, would make no sense since it would limit job opportunities, increase the cost of construction and eliminate the incentive for quality training.

³ See 40 U.S.C. § 276a; 29 C.F.R. § 5.5(a)(4).

Because either scenario would undermine the purposes and policies underlying the Fitzgerald Act, which mandates a Federal-state partnership that utilizes approved apprenticeship, the ERISA savings clause *must* operate to prevent preemption of such state regulations.

CONCLUSION

For the foregoing reasons, NECA respectfully submits that the decision of the Court below preempting California Labor Code § 1777.5 was erroneous and must be reversed.

Respectfully submitted,

Gary L. Lieber
Counsel of Record
Scott Robins
SCHMELTZER, APTAKER
& SHEPARD, P.C.
2600 Virginia Avenue, N.W.
Suite 1000
Washington, D.C. 20037-1905
(202) 333-8800

Attorneys for *Amicus Curiae*
The National Electrical
Contractors Association, Inc.

June 17, 1996

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No. 95-789

IN THE

Supreme Court Of The United States

October Term, 1996

**STATE OF CALIFORNIA,
DIVISION OF LABOR STANDARDS ENFORCEMENT,
DIVISION OF APPRENTICESHIP STANDARDS,
DEPARTMENT OF INDUSTRIAL RELATIONS
AND COUNTY OF SONOMA,**

Petitioners,

v.

**DILLINGHAM CONSTRUCTION, N.A., INC. AND
MANUEL J. ARCEO, DBA SOUND SYSTEMS MEDIA,**

Respondents.

On Writ of Certiorari To The
United States Court of Appeals for the Ninth Circuit

**BRIEF FOR SIGNATORY MEMBERS OF THE
COALITION TO PRESERVE ERISA PREEMPTION
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

INTERESTS OF AMICI CURIAE¹

This brief is being filed on behalf of the following members of the Coalition to Preserve ERISA Preemption (COPEP): Associated Builders and Contractors, Inc., Brown & Root, Inc., The Business Leadership Council, Independent Electrical Contractors, Inc., Public Service Research Council,

¹ Petitioners as well as Respondents have consented to the filing of this brief. Their letters of consent have been filed with the Clerk pursuant to Rule 37.3(a) of this Court.

and the Free Enterprise Institute, Inc. COPEP was formed in 1993 in response to legislation then being proposed in Congress, H.R. 1036 and S. 1580, to amend the state law preemption provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001, et seq.

H.R. 1036 and S. 1580, the ERISA Preemption Amendments of 1993, sought to amend the Act in order to permit state governments to regulate apprenticeship programs and other employee benefit plans through the enforcement of state prevailing wage laws. The present Petitioners in this case, and many of the amici supporting the Petitioners before this Court, were among the most vigorous supporters of the above referenced legislation, advancing many of the same arguments to Congress which they are now presenting to this Court.

COPEP opposed, and helped to defeat, the ERISA Preemption Amendments of 1993. COPEP members expressed the view that broad federal preemption of state laws relating to employee benefit plans is vital to the administration of uniform employee benefits, including apprenticeship training, by employers throughout the country. As is further discussed below, in refusing to pass the ERISA Preemption Amendments, Congress agreed with the need to preserve broad ERISA preemption of state regulation of apprenticeship plans and prevailing wage laws, to the extent such laws relate to such plans. The Ninth Circuit's decision in this case is consistent with that expressed legislative intent.

The COPEP members on whose behalf this amicus brief is filed are concerned that the present Petition constitutes a thinly veiled effort to overturn the will of Congress by narrowing the scope of ERISA preemption. The amici believe that the Ninth Circuit correctly found that the State of California has improperly attempted to regulate the Respondents' apprenticeship plan, in a manner which is preempted by the plain language of ERISA, and that the Court of Appeals decision should therefore be upheld.

Associated Builders and Contractors, Inc. (ABC) is a non-profit trade association of more than 18,500 construction industry contractors and related firms who share the belief that work should be awarded and performed on the basis of merit, regardless of labor affiliation. Many of ABC's members perform work covered by prevailing wage laws in California and other states. Many of ABC's 80 chapters and individual member companies have also spent substantial sums of money to sponsor and administer ERISA-covered apprenticeship plans for the benefit of employees, most (but not all) of whom are non-union. The successful operation of such plans from state to state will be significantly and adversely affected by reversal of the Ninth Circuit's holding.

Brown & Root, Inc. is one of the world's largest construction companies, with thousands of employees. Brown & Root has made a very large investment in employee training and sponsors or participates in apprenticeship programs for the benefit of its employees throughout the country. It is vital to the success of these programs that they be subject to uniform regulation from state to state, and from place to place within each state. Brown & Root is concerned that its substantial investment in employee training will be placed at risk if the arguments advocated by the Petitioners are adopted.

The Business Leadership Council is an association of large and medium sized businesses dedicated to reviving the American economy by restoring opportunity, protecting private property and ensuring personal security and liberty. ERISA preemption of state laws relating to employee benefit plans is critical to the ability of employers to provide fringe benefits, including apprenticeship training, necessary to attract and develop high quality employees and to compete in a global economy.

The Independent Electric Contractors, Inc. (IEC) is a trade association of more than 2,500 electrical contractors in the construction industry. Many IEC chapters and individual

members have spent substantial sums of money to sponsor and administer apprenticeship plans for the benefit of employees. IEC believes that the successful operation of these apprenticeship plans will be jeopardized by reversal of the Ninth Circuit's holding, to the extent that the Court permits state regulation of apprenticeship plans which have been previously protected from state interference by ERISA preemption.

The Public Service Research Council (PSRC) is a non-profit public policy research organization which believes strongly in the right of businesses and employees to be free of unwarranted government regulation. The PSRC views ERISA preemption of state laws relating to employee benefit plans as an important protection of private employee benefits against governmental interference, which should be preserved in accordance with the plain language of the Act.

The Free Enterprise Institute is a non-profit grass roots lobbying organization whose purpose is to mobilize citizen support for initiatives that would promote greater individual freedom and smaller government. The Institute believes that ERISA preemption of state laws must be preserved, and the Ninth Circuit decision upheld, in order to protect employee benefit plans from being subjected to improper state government regulation and interference.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit under review is consistent with the plain language and legislative history of ERISA's preemption provision, which this Court has previously found to preempt conflicting state laws relating to employee benefit plans "in the broadest possible terms." Congress declared ERISA's broad preemption clause to be the "crowning achievement" of the federal law, and Congress has explicitly rejected attempts to exempt state prevailing wage and apprenticeship laws from ERISA's preemptive language.

It is critical to preservation of uniformity in the regulation of apprenticeship programs under ERISA that the Ninth Circuit's decision be upheld. Absent ERISA's protective provisions, employers seeking to provide much needed apprenticeship training around the country will be subject to myriad conflicting state apprenticeship regulations which will be enforced through regulation of the states' equally polyglot prevailing wage laws. As a result, legitimate and beneficial job training plans will be jeopardized, just as the authors of ERISA feared.

Contrary to the Petitioners' arguments, the Ninth Circuit's decision does not undermine enforcement of state prevailing wage laws generally. Rather, ERISA preemption is called for here because California has chosen to *combine* enforcement of its prevailing wage law with specific state apprenticeship regulations, and to use this combination as a device to impose state-preferred apprenticeship standards on nonconforming employers. It is this *direct relation* between the prevailing wage law and the regulation of employee apprenticeship benefit plans which places the California scheme squarely within the scope of this Court's long line of cases finding ERISA preemption.

There can also be no doubt, contrary to the Petitioners' arguments, that the terms of the challenged statute relate to an apprenticeship "plan" intended to be protected by ERISA preemption. The state law here directly affects the administrative and financial aspects of ERISA-covered apprenticeship plans, in a manner not permitted by the Act.

For these reasons, the present case is consistent with *New York Conference of Blue Cross v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995), and is distinguishable on its facts. Because the California law expressly refers to ERISA-covered apprenticeship and directly binds employers in their choices regarding such plans, the state law should be preempted in accordance with the Court's decisions in *District of Columbia*

v. Greater Washington Board of Trade, 506 U.S. 125 (1992) and *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990).

California's regulation of apprenticeship is unusually intrusive and is not saved by Petitioners' claims that regulation of prevailing wages is a "traditional exercise of the state's police power." Regulation of apprenticeship plans under state prevailing wage laws is a relatively recent development and has been attempted by only a minority of states. This Court has also held, in analogous circumstances, that "tradition" alone is an insufficient ground for ignoring the plain language of ERISA preemption.

The Petitioners are also wrong to contend that the type of state regulation at issue here is "saved" by virtue of the National Apprenticeship (Fitzgerald) Act, 29 U.S.C. §50. That statute only authorizes states to establish apprenticeship standards consistent with and relating to federal registration of apprentices. Nothing in the Apprenticeship Act or its accompanying regulations authorizes or calls upon states to impose sanctions for the failure of an employer to register apprentices in an approved program. Moreover, the state here is not seeking to enforce the federal law at all, but is instead regulating apprenticeship programs in connection with state public works.

The Court should resist the Petitioners' request to exempt state prevailing wage laws from ERISA preemption, to the extent that such laws relate to apprenticeship training plans, as is clearly the case under the presently challenged California law.

ARGUMENT

I. The History of ERISA Establishes Congressional Intent to Broadly Protect Apprenticeship Training Programs from State Interference.

Petitioners' claims rest on a distorted version of history, both as to the purpose of ERISA and the state law "traditions" relating to apprenticeship and prevailing wages. In reality, Congress intended to preempt precisely the kind of state laws which are at issue in the present case, and Congress reaffirmed its intent by rejecting Petitioners' claims for a special exemption for such state laws within the last two years.

As this Court has repeatedly held, Congress enacted Section 514 of ERISA in order to establish the regulation of employee welfare benefit plans as "exclusively a federal concern." *N.Y. Conference of Blue Cross v. Travelers Ins.*, 115 S. Ct. 1671, 1677 (1995), quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

As the Court further noted in *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992), Congress chose preemptive language which is "deliberately expansive." See also *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 47 (1987). By declaring that ERISA would preempt any state law which "relates" to a covered employee benefit plan, Congress intended to override any state law which "has a connection with or reference to such a plan." *Greater Washington Board of Trade, supra*, 113 S. Ct. at 583.

This Court has further held that it is unnecessary to show that the state law was "specifically designed to affect such plans," or that the effect is "direct." *Ingersoll-Rand, supra*, 498 U.S. at 139; accord, *Travelers Ins., supra*, 115 S. Ct. at 1683. Rather, the Court reaffirmed in *Travelers* that "a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to

adopt a certain scheme of substantive coverage or effectively restrict its choice[s]. . . , and that such a state law might indeed be pre-empted under §514." *Ibid.*

None of this was accidental. The principal reason for Congress's enactment of ERISA was to foster the growth of employee benefit plans. 120 Cong. Rec. 29197 (1974). In order to accomplish this goal, Congress recognized the importance of eliminating the threat of conflicting or inconsistent state and local regulations of employee benefit plans. One of the law's sponsors, Congressman Dent, described the reservation to federal authority of the sole power to regulate the field of employee benefit plans as ERISA's "crowning achievement." 120 Cong. Rec. 29197 (1974).

Senator Williams, a chief sponsor of ERISA in the Senate, stressed that with the narrow exceptions specified in the Act (relating to insurance contracts, banks, trust companies, or investment companies), federal preemption was intended to apply in its broadest sense to all actions of state or local governments relating to benefit plans. *Id.* at 29933.

It is undisputed that ERISA's drafters deliberately included within the Act's protective coverage any "plan, fund, or program" established or maintained for the purpose of providing employee participants with "apprenticeship or other training programs." 29 U.S.C. §1002(1). At the same time, Congress failed to exempt from its preemption provisions any state laws relating to apprenticeship, including prevailing wage laws. Each of these facts contradicts the Petitioners' arguments that Congress somehow did not intend to preempt the laws at issue in the present case.

Any doubt as to Congress' preemptive intent was removed in 1994, when Congress rejected a large-scale effort to amend ERISA expressly to exempt the type of state laws now before the Court. The Petitioner State of California, together with other state governments and the AFL-CIO, demanded that Congress create an exemption from ERISA preemption

which would allow the states to enforce prevailing wage laws relating to employee benefits and to enforce apprenticeship standards in particular. They did so after several court decisions declared that state enforcement of apprenticeship standards and/or prevailing wage laws in a manner relating to employee benefit plans was preempted by ERISA. See *General Electric Co. v. New York State Department of Labor*, 891 F. 2d 25 (2d Cir. 1989), cert. den., 496 U.S. 912 (1990); *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Committee*, 891 F. 2d 719 (9th Cir. 1989), cert. den., 111 S. Ct. 72 (1990).

Rep. Berman of California introduced H.R. 1036 in the House in February 1993 (after a predecessor bill failed to come to a vote in 1992), and Senator Kennedy introduced S. 1580 in the Senate. H.R. 1036 was extensively debated and passed the House, as amended, on November 9, 1993. 139 Cong. Rec. H8977 (Nov. 9, 1993).² Though reported in the Senate in July, 1994, however, the bill could not muster suffi-

² H.R. 1036 would have amended Section 514(b) of ERISA to state: "Subsection (a) shall not apply to -- (A) any provision of State law to the extent that such provision requires the payment of prevailing wages, including employee benefits, on public projects and permits any prevailing employee benefit plan contribution or cost requirement of such law to be met by crediting -- (i) the payment of employee benefit plan contributions or costs, (ii) the payment of wages in lieu of such contributions or costs, or (iii) the payment of a combination of wages and such contributions or costs; except that this subparagraph shall not be construed to exempt from subsection (a) any such provision to the extent it otherwise mandates the maintenance of, or otherwise regulates the benefits or operations of, any employee benefit plan; [or] (B) any provision of State law to the extent that such provision -- (i) establishes minimum standards for the certification or registration of apprenticeship or other training programs, (ii) concerns the establishment, maintenance, or operation of a certified or registered apprenticeship or other training program, or (iii) makes certified or registered apprenticeship or other training an occupational qualification, and does not conflict with any right, requirement, or duty established under this title;"

cient votes for passage, and died with the end of the Congressional session that year.

The debates in the House are revealing. Congressman Goodling (R-PA), then ranking minority member of the House Education and Labor Committee, declared his opposition to the bill on the following grounds:

H.R. 1036 now seeks to depart from ERISA's well-reasoned preemption provision by allowing states excessively broad authority with regard to apprenticeship and training laws. When ERISA was enacted in 1974, its sponsors made clear their intention for the broadest possible preemption of State laws in order to eliminate the threat of restrictive, conflicting, and inconsistent State and local regulation. They were seeking to expand and enhance the benefits employers provided their workers by establishing a single, consistent set of rules that applied to all employee benefit plans.

In short, ERISA's preemption provisions were originally intended, and continue to be, as much in employees' best interest as they are in employers'. This is no more clear than in the case of ERISA apprenticeship and training programs. ERISA has encouraged their development and expansion.

However, by allowing States to restrict the types of apprenticeship and training programs employers may utilize, H.R. 1036 could preclude many employers from training their own workers, thereby increasing their costs while at the same time diminishing their available pool of skilled workers.

Id. at H8962.

Significantly, as a result of the 1994 Congressional elections, Representative Goodling became Chairman of the House Economic and Educational Opportunities Committee, the Committee with primary jurisdiction over ERISA issues.

Since 1994, Republican Congressional leaders have understandably made no effort to resurrect the bill which they so vigorously opposed.

If enacted, H.R. 1036 would have accomplished exactly the result sought by the Petitioners in the present case by removing prevailing wage laws and apprenticeship standards from the scope of ERISA preemption. But the bill did not pass both houses of Congress, notwithstanding vigorous debate. This Congressional refusal to depart from existing law, according to this Court's holdings, is "instructive", with regard to Congress's intent under ERISA. *See Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 836, n.12 (1983)

The Court should defer to the will of Congress and should not permit the Petitioners to make an "end run" around Congressional opposition to narrowing the scope of ERISA preemption. As is further discussed below, the type of state law at issue here directly and intrusively "relates" to ERISA-covered apprenticeship plans, in a manner which would significantly undermine the preemptive intent of ERISA, if allowed to stand.

II. The Express Incorporation of State Apprenticeship Standards into California's Prevailing Wage Enforcement Scheme is Not a "Traditional Exercise of State Police Powers" or a Mere Law of General Application.

Petitioners and their amici have similarly distorted the history of prevailing wage and apprenticeship laws in order to justify their present action. They have argued that California's laws are exempt from ERISA preemption because they are part of a long historical tradition of state regulation of wages and apprenticeship.

Petitioners have overstated their case. In reality, it is a fairly recent development, in those states which have done it at all, for states to have combined their prevailing wage law with direct references to and enforcement of apprenticeship

standards affecting the administration of private apprenticeship plans or programs.

States prevailing wage laws, where they exist at all, vary widely in scope and content.³ Most of the state prevailing wage laws originally made no reference to fringe benefits. (The federal Davis-Bacon Act, 40 U.S.C. §276a, did not address fringe benefits until 1962). For example, New York did not seek to include fringe benefits within the scope of its prevailing wage law until 1956, and did not attempt to address apprentices under the prevailing wage law until 1966, only 8 years before ERISA was passed. N.Y. Lab. Law §220(3)(McKinney 1986).⁴

Many of the state prevailing wage laws listed by Petitioners impose no state requirements relating to apprenticeship programs at all. See, e.g., Mo. Code §290.210 (1937). Administrative rulings in those states which do address apprenticeship are of much more recent vintage. See Mo. Prev. Wage Law Rules, 8 CSR 30-3.030 (1990). Perhaps most significantly, most state prevailing wage laws and regulations

³ Professor Thieblot, whose 1987 study of state prevailing wage laws is cited in the amicus brief of the States (at p.10, n.3), has more recently conducted a comparative survey of state prevailing wage laws. See *State Prevailing Wage Laws: An Assessment at the Start of 1995* (ABC ed. 1995). Thieblot's comparison shows that these laws vary widely from state to state, ranging from those which "are mild enough not to be particularly intrusive in the way contracting is done" to those which "open up a whole new Byzantine world of government intervention to the contractor . . ." *Id.* at 12. According to Thieblot, California's prevailing wage law ranks as the second most onerous in the country (one point behind Massachusetts). "In almost all particulars, it is more restrictive and more highly labor oriented than the federal [Davis-Bacon] law." *Id.* at 31.

⁴ A sampling of other state prevailing wage laws reveals similar gaps between enactment of the statute and the much more recent references to apprenticeship in connection with those laws. See, e.g., Tenn. Code Ann. §12-4-401 (enacted in 1953; apprenticeship not referenced until 1976); Wash. Rev. Code §39.12.021 (enacted in 1945; apprenticeship not referenced until 1963).

other than California permissively define apprenticeship as any program which meets federal or state standards. See, e.g., Wisconsin ILHR 290.02 (1967)("Apprentices may work at less than the prevailing wage rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program administered by the U.S. department of labor, a state agency recognized by the U.S. department of labor, or under Wisconsin's apprenticeship law").

In addition, notwithstanding Petitioners' claims of historical state apprenticeship regulation (Pet. Br. at 2-6), most states have treated apprenticeship as a voluntary program conducted according to terms established between employer associations and employees. Until recently, states did not attempt to dictate the terms of apprenticeship programs, nor did they attempt to enforce state standards through regulation, as opposed to voluntary certification.

The voluntariness of apprenticeship standards was an essential element of the National Apprenticeship Act, 29 U.S.C. §50, when that law was passed in 1937. As noted in *National Elevator Industry, Inc. v. Calhoun*, 957 F. 2d 1555, 1562 (10th Cir. 1992):

Section 50 does not depend upon states to enforce its provisions; in fact, there is nothing in §50 for states to enforce. Section 50 merely seeks to facilitate development of apprenticeship programs - it does not mandate apprenticeship programs or seek to discourage other training programs.

Thus, Petitioners are wrong to state that any historical tradition of either prevailing wage law or apprenticeship standard enforcement justifies the broad exemption from ERISA preemption which they now espouse. The number of states which have combined prevailing wage laws with apprenticeship certification in such a way as to convert voluntary train-

ing programs into mandatory "sole source" programs is small and is not of long standing.

Finally, Petitioners have ignored an unfortunate aspect of the history of state apprenticeship regulation, which is the extent to which state standards have been abused by special interest groups to control and limit the availability of apprenticeship training in the construction industry. In particular, it is clear that the series of cases which first raised the issue of ERISA preemption in the area of apprenticeship came about because union-dominated state apprenticeship councils discriminated against or otherwise interfered with the administration of non-union or non-approved union apprenticeship training programs.

As a result of these state activities, ERISA's express goal of encouraging diverse and creative fringe benefit programs for employees throughout the country has been threatened. *See Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint App. Comm.*, 891 F. 2d 719 (9th Cir. 1989), *cert. den.*, 111 U.S. 72 (1990) (state agency banned union contractor from public works because contractor refused to participate and make contributions to state-mandated ERISA-covered apprenticeship plan); *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F. 2d 270 (9th Cir. 1991) (BAT-approved apprenticeship program was arbitrarily denied state council approval and thereby penalized under state prevailing wage law); *Boise Cascade Corp. v. Peterson*, 939 F. 2d 632 (8th Cir. 1991), *cert. den.*, ___ U.S. ___ (1992) (state sought to impose arbitrary minimum jobsite ratio rule of apprentices to journeymen, directly affecting all non-conforming apprenticeship programs); *see also Associated General Contractors, San Diego Chapter, Inc. v. Smith*, 74 F. 3d 926 (9th Cir. 1996); *Inland Chapter of Associated General Contractors of America v. Dear*, 77 F. 3d 296 (9th Cir. 1996); *National Elevator Industry v. Calhoon*, 957 F. 2d 1555 (10th Cir. 1992); *Joint Apprenticeship & Training Council of Local 363 v. New York State Dept. of Labor*, 984 F. 2d 589 (2d Cir. 1993); *Southern*

California Chapter ABC v. California Apprenticeship Council, 4 Cal. 4th 422, 14 Cal. Rptr. 2d 491 (1992).

If the Court now retreats from or weakens the scope of ERISA protection outlined in these and other cases, which Congress has refused to do, then the ability of employers to provide the important benefit of employee training to their employees will be significantly hindered. As is further discussed below, nothing in this Court's decisions on ERISA preemption supports the Petitioners' call for such a retreat.

III. The California Laws At Issue Here Plainly "Relate to" ERISA-Covered Apprenticeship Plans, Within the Holdings of this Court's *Travelers* and *Board of Trade* Decisions, and Must be Found to Be Preempted.

Under the plain language of ERISA, as consistently interpreted by this Court, California's *atypical* combination of prevailing wage and apprenticeship laws directly relates to ERISA-covered apprenticeship plans and must be preempted. In this regard, contrary to the Petitioners' claim, nothing in this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671 (1995), exempts the presently challenged laws from ERISA's preemption bar. Rather, the consistent interpretations of ERISA by this Court, including the *Travelers* case, all support the continued preemption of the direct and intrusive state interference with apprenticeship training which Petitioners are now advocating.

At the outset, there can be no doubt that the apprenticeship plan affected by the combination of state laws at issue here constitutes an ERISA-covered employee benefit "plan, fund or program." Petitioners do not seriously argue this point in their Brief, but the amicus briefs of the AFL-CIO and the United States spend an inordinate amount of time attempting to distinguish between the funding of apprenticeship

programs and the standards by which such programs are operated. The Petitioners' amici are mistaken.

The factual record of this case is undisputed in establishing that the Respondents' apprenticeship program, which was denied approval by the state, was an ERISA-covered employee benefit plan. As has been mentioned above already, ERISA expressly covers apprenticeship "plans, funds or programs", and both the district court and the Ninth Circuit correctly found that the particular program at issue here met the statutory definition.

The distinction posed by the AFL-CIO between a "program," and a "program to fund a program" (AFL-CIO Brief at 4), if it exists at all, is irrelevant to the present case, because the Respondents' apprenticeship program clearly constituted both. The program was collectively bargained and established a plan by which the apprenticeship program would be funded and operated. Notwithstanding these classic features of an ERISA-covered employee benefit plan, the state refused to allow the contractor to employ apprentices as apprentices, i.e., at apprentice wage rates on public works.

This case is thus completely unlike the decision of *Massachusetts v. Morash*, 490 U.S. 107 (1989), where the Court found no preemption because unused vacation time paid out of general assets did not constitute an employee welfare benefit plan. The Respondents here clearly did have an ERISA-covered employee benefit plan to provide apprenticeship training, and the state clearly intruded into the Respondents' administration and implementation of their plan, in a manner prohibited by ERISA.

The Petitioners' amici also attempt inappropriately to distinguish between state laws which regulate apprenticeship standards and those which regulate program financing. The California laws at issue here clearly regulate both, by nature of the intrusive approval process, as enforced by the prevailing wage law. See Cal. Lab. Code §§1771 and 1771.5. This

combination of laws directly and significantly affects both the administrative and financial aspects of apprenticeship programs, which are integrally related to each other in any event. See *Hydrostorage, Inc.*, *supra*, 891 F. 2d at 728.⁵

The real question at issue in this case then is simply whether California's unusually intrusive combination of apprenticeship and prevailing wage laws "relates to" Respondents' apprenticeship program within the meaning of ERISA. Petitioners apparently believe that the *Travelers* case, though unanimously decided less than three years after the 8-1 decision in *Greater Washington Board of Trade*, nevertheless somehow accomplished a sea change in the Court's standard for ERISA preemption. (Pet. Br. at 21-22). The *Travelers* opinion itself does not support Petitioners' view. Rather, the holding of that case is consistent with the long established interpretations of ERISA preemption by the Court, as summarized in both *Travelers* and *Greater Washington Board of Trade*, as well as in *Ingersoll-Rand* and other predecessor decisions.

Thus, the Court has consistently held that a state law will be found preempted if it "has a connection with or refers to" an employee welfare benefit plan, and that "the basic thrust of the preemption clause is to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Travelers*, *supra*, 115 S. Ct. at 1677-78; accord, *Greater Washington Board of Trade*, *supra*, 113 S. Ct. at 583. The state law is preempted whether its effect on ERISA-covered plans is direct or indirect, particularly

⁵ The amici's narrow view of the term "apprenticeship program" also conflicts with the existing federal definition set forth in 29 C.F.R. §29.2(l). That regulation states: "Apprenticeship program shall mean a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, including such matters as the requirement for a written apprenticeship agreement."

where the law forces an ERISA plan to adopt a certain scheme of substantive coverage. *Travelers*, *supra*, 115 S. Ct. at 1683.

The different outcomes in *Travelers*, on the one hand, and such cases as *Greater Washington Board of Trade* and *Ingersoll-Rand*, on the other, are explainable, not surprisingly, by the differences in the state laws themselves. In this respect, the present case is simply much closer in its facts to the latter two decisions and, like those state laws, the California laws at issue here should be preempted.

First, unlike the statute in *Travelers*, but like the law in *Greater Washington Board of Trade*, the California prevailing wage law incorporates laws expressly referring to apprenticeship programs. Cal. Labor Code §1777. Much of the Court's discussion in *Travelers* arose from the fact that it was interpreting the "connection with" component of the "relation to" formulation, *i.e.*, the statute under review there did not actually refer to ERISA-covered plans. Such an inquiry is unnecessary here, because unlike the general cost surcharges in *Travelers*, the challenged statute here expressly refers to apprenticeship and is preempted on that ground alone. See *Greater Washington Board of Trade*, *supra*, 113 S. Ct. at 583.⁶

In addition, the surcharge statute at issue in *Travelers* did not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." *Travelers*, *supra*, 115 S. Ct. at 1679. By contrast, the present state law, by requiring apprenticeship programs to obtain state approval in order to comply with the state prevailing wage law, plainly does bind plan administrators to abide by the state's regulation of their ERISA plans. The detailed apprenticeship re-

⁶ The present statute is also presumptively preempted, unlike the statute at issue in *Travelers*, because the California law is "specifically designed" to affect ERISA plans and because it mandates specific benefits. See *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504 (1981); *Ingersoll Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990).

quirements set out in the California Labor Code thus bear no resemblance to the flat surcharges construed in *Travelers* and require a different result.

As the Ninth Circuit held in *Inland Empire Chapter v. Dear*, 77 F. 3d 296 (9th Cir. 1996) and *ABC National Line Erection Apprenticeship v. Aubry*, 68 F. 3d 343, 345 (9th Cir. 1995), both of which construed *Travelers*, contractors facing California's type of apprenticeship/prevaling wage regulation "must find a state approved program or forego using apprentices," and "suffer direct injury due to the discouragement of unapproved programs." For each of these reasons, under the holding of *Travelers* itself, the California combination of laws is preempted by ERISA. It simply cannot be said of California's law, as was true of the surcharges in *Travelers*, that "the state law has only a tenuous, remote, or peripheral connection with covered plans." 115 S. Ct. at 1680. See also *Greater Washington Board of Trade*, 506 U.S. at 130, n.1.

Finally, the Court in *Travelers* was concerned that a finding of ERISA preemption in that case would have "barred any state regulation of hospital costs," a "traditional" exercise of state authority. 115 S. Ct. at 1681. By contrast, the Ninth Circuit's decision does not broadly preempt state prevailing wage laws in general, but only to the extent that they relate to apprenticeship plans by imposing state regulation on such plans.

This distinction has recently been made clear by the Ninth Circuit itself, in the case of *WSB Electric, Inc. v. Curry*, 1996 U.S. App. Lexis 16027 (9th Cir. July 5, 1996). There, the court declined an invitation to invalidate California's entire prevailing wage law, distinguishing the indirect effects of the law in general from the direct impact of the apprenticeship provisions described in the *Dillingham* case. The Petitioners' announced fears for the enforceability of their general prevailing wage statute have thus been shown to be groundless. At the same time, because California and a very few other

states have extended the reach of their laws by combining them with and expressly enforcing state apprenticeship standards which directly impact upon ERISA-covered plans, the challenged statute must be found to be preempted.

As has already been shown above, there is no tradition of combining state prevailing wage laws with state enforcement of apprenticeship standards, as compared to the tradition of state regulation of health care costs generally which was present in *Travelers*.⁷ In addition, in *Travelers* the Court remarked that "there is not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." 115 S. Ct. at 1681. Here, on the other hand, Congress has quite recently made clear its intent to prevent state prevailing wage and apprenticeship laws from interfering with private apprenticeship programs. See discussion above at pp. 8-11.

IV. The Savings Clause of ERISA Does Not Save California's Prevailing Wage Law From Preemption to the Extent that It Incorporates and Imposes State Apprenticeship Standards on ERISA-covered Plans.

Petitioners' final claim is that, to the extent that their law does relate to ERISA-covered apprenticeship plans, as it certainly does, such effects are "saved" by the National Apprenticeship ("Fitzgerald") Act, 29 U.S.C. §50 and the savings clause of ERISA Section 514(d).⁸ As this Court held in *Shaw*

⁷ Significantly, the Court confronted a "traditional" exercise of state authority in *Greater Washington Board of Trade*, in the form of state workers compensation laws. The Court nevertheless found that the preemptive provisions of §514 applied, once it was determined that the law in question related to a covered plan. 113 S. Ct. at 584.

⁸ The savings clause states: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. §1144(d).

v. Delta Airlines, Inc., 463 U.S. 85 (1983), however, the savings clause operates only to exempt provisions of state laws upon which federal laws depend for their enforcement. . . . California's enforcement of state apprenticeship standards on state public works projects, through a combination with its prevailing wage laws, is not necessary to the enforcement of any federal law.

As noted above, the Tenth Circuit in *National Elevator Industry, Inc. v. Calhoon*, *supra*, 957 F. 2d at 1561, correctly observed that Section 50 of the National Apprenticeship Act "does not depend upon states to enforce its provisions; in fact, there is nothing in §50 for states to enforce." Section 50 merely seeks to facilitate development of apprenticeship programs - it does not mandate apprenticeship programs or seek to discourage other training programs. The Tenth Circuit further agreed with the Ninth Circuit's holding that "the [Fitzgerald Act] regulations relate only to eligibility for federal registration. Neither they nor the Act itself contemplate enforcement mechanisms." *Citing Hydrostorage*, *supra*, 891 F. 2d at 731.

For these reasons, the state law at issue here likewise is not saved by the Fitzgerald Act. California Labor Code Section 1777.5 is not enforcing federal law. Instead, the state is enforcing state apprenticeship standards on state public works projects paid for with state funds and in combination with a state prevailing wage law. The savings clause of ERISA is not implicated by the Fitzgerald Act in the present case and the California Law must be preempted.

CONCLUSION.

The ERISA preemption clause has served well the fundamental goal of the Act, to promote the development of private employee benefit plans, including apprenticeship programs. It is important that the Court preserve the vitality of ERISA preemption against uniquely intrusive state laws like California's which will otherwise hinder the further development of much needed training of employees in the construction industry. For each of the reasons set forth above and in Respondents' Brief, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

Maurice Baskin, Esq.

(Counsel of Record)
Venable, Baetjer, Howard &
Civiletti, LLP
1201 New York Ave., N.W.
Washington, D.C. 20005
202-962-4800

August 1, 1996

(21)
No. 95-789

Supreme Court, U.S.

FILED

AUG 1 1996

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

**STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS and COUNTY OF SONOMA,**

Petitioners,

v.

**DILLINGHAM CONSTRUCTION, N.A., Inc. and
MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,**

Respondents.

**On Writ of Certiorari To The
United States Court of Appeals for the Ninth Circuit**

**BRIEF FOR THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AND THE NATIONAL
ASSOCIATION OF MANUFACTURERS AS AMICI
CURIAE IN SUPPORT OF RESPONDENTS**

Of Counsel
STEPHEN A. BOKAT
Mona C. Zilberg
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062-2000
(202) 463-5337

JAN S. AMUNDSON
QUINTIN REICHEL
NATIONAL ASSOCIATION OF
MANUFACTURERS
1231 Pennsylvania Ave., N.W.
Ninth Tower, Suite 1500
Washington, D.C. 20004-1790
(202) 637-3036

TIMOTHY B. DYK
(COUNSEL OF RECORD)
DANIEL H. BROMSBERG
JONES, DAY, REAVIS & FOGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

*Counsel for the Chamber of
Commerce of the United States
of America and the
National Association of
Manufacturers*

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INTEREST OF AMICI CURIAE¹

The Chamber of Commerce of the United States of America (the "Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents the interests of over 215,000 corporations, partnerships, and proprietorships, as well as several thousand state and local chambers of commerce and trade and professional associations.

The National Association of Manufacturers (the "NAM") is the nation's largest broad-based industrial trade association. It represents nearly 14,000 companies. These companies employ approximately 85% of the manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. An additional 158,000 businesses are affiliated with the NAM through its Associations Council and National Industrial Council. Both the Chamber and the NAM regularly represent the interests of their members in matters before the courts, the United States Congress, the Executive Branch, and independent federal regulatory agencies.²

Most of the companies represented by the Chamber and the NAM provide their workers with pension and welfare benefits. Administering these benefits is often a complex and expensive undertaking. It is necessary, among other things, to determine

¹ Petitioners as well as respondents have consented to the filing of this brief. Their letters of consent have been filed with the Clerk pursuant to Rule 37.3(a) of this Court.

² The Chamber and the NAM are also members of the Coalition to Preserve ERISA Preemption. In 1991, as part of that coalition, representatives of the Chamber and the NAM testified before the House Subcommittee on Labor-Management Relations in opposition to a bill that would have exempted state prevailing wage laws from preemption under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* The Chamber and the NAM also opposed a similar bill introduced in 1993.

the eligibility of plan participants (who may, in a Fortune 500 company, number in the tens of thousands), calculate benefits levels, make disbursements, monitor the availability of funds, and maintain appropriate records. The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, imposes comprehensive and detailed regulations upon the administration of pension and welfare benefits plans. To minimize the burden of complying with these regulations, ERISA preempts state and local regulations that "relate to" ERISA-covered plans.

Before this Court, the State of California and the County of Sonoma ("Petitioners") have argued that state and local regulation of government contracting should be immune from preemption under ERISA. Many Chamber and NAM members sell products or services to state and local governments. If this Court were to recognize the immunity Petitioners propose, state and local governments would be free to impose new regulations on benefits plans maintained by their contractors. Such regulation would be in addition to, and potentially in conflict with, both ERISA and the regulations of other state and local governments. An immunity for state laws regulating government contractors would also subject businesses to different requirements for those operations that relate to government contracting and those that do not. Such complex and potentially inconsistent new regulation would greatly increase the costs of compliance, create waste and inefficiency, and force some companies to either reduce benefits or eliminate benefits plans altogether.

Allowing differing and potentially inconsistent state and local regulation of benefits plans would directly contradict Congress' intentions in enacting ERISA and this Court's construction of ERISA's preemption clause. Because of the importance of these matters to their members and to the nation as a whole, the Chamber and the NAM have a vital interest in this case.

INTRODUCTION AND SUMMARY

This brief focuses on a single argument advanced by the Petitioners and their *amici*: that state laws governing public

contracting are immune from preemption under ERISA. *See* Pet. Br. at 23, 29; Brief of the AFL-CIO at 21. This argument has no basis either in ERISA or in the decisions of this Court.

1. The immunity that Petitioners propose cannot be squared with ERISA's preemption clause. The history, language, and purpose of ERISA all preclude any immunity for state laws regulating government contracting. In enacting ERISA, Congress made a conscious decision to sweep away the hodgepodge of state laws that had previously governed benefits plans and make the administration of such plans an exclusively federal concern. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Accordingly, Congress included in ERISA one of the broadest preemption clauses in federal law. That clause provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a) (1994). There is no logical way to construe this language so that state laws "relate to" ERISA-covered plans when they regulate government contractors but not when they impose the same regulations on purely private employers. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Nor is it conceivable that Congress intended to authorize the courts to create implied exemptions to ERISA preemption. While ERISA specifically exempts state laws regulating insurance and other enumerated areas of traditional local concern, *see* 29 U.S.C. § 1144(b), there is no exemption for laws regulating government contracting. This omission is significant. In a statute as detailed and comprehensive as ERISA, it cannot be seriously argued that Congress intended implicit exemptions in addition to the ones it specifically enumerated. *See Mackey*, 486 U.S. at 837; *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

Just as importantly, the immunity Petitioners propose cannot be reconciled with the goals of ERISA preemption. Congress intended ERISA's expansive preemption clause to "afford employers the advantages of a uniform set of administrative

procedures governed by a single set of regulations." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). Immunizing state laws regulating government contracting from preemption would undermine this goal by subjecting benefits plans to differing regulation by the federal government and by a multitude of state and local governments. Such an immunity would also subject employers to separate regulations for their government contracting operations. In short, the immunity that Petitioners propose would create the very patchwork of regulation that Congress intended ERISA's preemption clause to prevent.

Nor do this Court's decisions support Petitioners' immunity argument. This Court has never recognized any immunity from preemption, presumptive or otherwise, for state laws regulating government contracting. To the contrary, in *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986), this Court found a Wisconsin law regulating government contracting preempted without any suggestion that such laws are immune from preemption. Nor is this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995), to the contrary. In *Travelers*, this Court found a New York law regulating hospital rates was not preempted because it did not refer to any ERISA plan and only indirectly affected the administration of such plans. While *Travelers* referred to the presumption that Congress did not intend to preempt state laws regulating traditional areas of local concern, this Court applied the presumption only after determining that the state law at issue neither referenced nor directly affected an ERISA plan. Nothing in that opinion even remotely suggests that Congress intended to generally immunize traditional state laws from preemption, and any presumption to that effect would directly conflict with Congress' goal of eliminating state regulation in areas of traditional state concern that "relate[s] to" ERISA plans.

2. California's prevailing wage law is not saved by any exception for proprietary conduct. Relying on decisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, Petitioners argued before the Ninth Circuit that California's

prevailing wage law was not preempted because it was proprietary in nature. As Petitioners have not advanced this argument here, this Court should decline to consider it.

If this Court does consider the proprietary conduct issue, it should reject Petitioners' argument. ERISA's preemption clause does not permit an exception for proprietary conduct affecting the ERISA plans of government contractors. An exception for proprietary conduct would undermine the clause's goal of uniform and exclusive federal regulation by permitting state and local governments to impose supplemental, and potentially conflicting, requirements on government contractors. In any event, under the standards developed in NLRA cases, California's prevailing wage law is not proprietary. The prevailing wage law is an exercise of governmental, not contractual, power; there is no evidence that the law imposes requirements typical of those imposed by private actors; and the law plainly furthers regulatory, rather than proprietary, interests.

ARGUMENT

I. STATE LAWS THAT REGULATE GOVERNMENT CONTRACTING ARE NOT IMMUNE FROM PREEMPTION UNDER ERISA.

Under California's prevailing wage law, Cal. Lab. Code §§ 1770-80, state contractors must generally pay employees working on state public works projects the journeyman wage prevailing in the area. *See id.* § 1771 (West 1989). These contractors may, however, pay apprentices a lower wage if those apprentices are enrolled in an apprenticeship program approved by the State. *See id.* § 1777.5 (West Supp. 1996). Before this Court, Petitioners and their *amici* argue that, whatever its effect on apprenticeship programs subject to regulation under ERISA, the prevailing wage law is not preempted by ERISA because the law regulates government contracting. Pet. Br. at 21, 23-29; Brief of the Council of State Governments at 8-10 [hereinafter, State Gov. Br.]. Specifically, they assert that state laws regulating

government contracting and other areas of traditional state concern are immune from preemption under ERISA unless preemption of the law in question "was the clear and manifest purpose of Congress." Pet. Br. at 21 (quotation omitted); see also *id.* at 8. This assertion conflicts with both ERISA and the decisions of this Court.

A. ERISA Preempts State Laws That Relate To ERISA Plans Even When Those Laws Regulate Government Contracting.

As this Court has observed, ERISA contains a "deliberately expansive" preemption clause. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). The history, language, and purpose of this clause clearly preclude any immunity from preemption, presumptive or otherwise, for state laws regulating government contracting.

History — Historically, welfare and pension plans were subject to regulation under state laws governing a number of areas of traditional local concern, including trusts, insurance, banking, and fiduciary responsibilities. See D. McGill & D. Grubbs, Jr., *Fundamentals of Private Pensions* 47-48 (6th ed. 1989); see generally H. Rep. No. 533, 93d Cong., 1st Sess. 3-5 (1973). In 1958, with the Welfare and Pension Plan Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997, repealed by 29 U.S.C. § 1031(a), Congress attempted to encourage state regulation more specifically targeted at pension and welfare plans. See *Malone v. White Motor Co.*, 435 U.S. 497, 511 (1978) (plurality opinion). When such regulations failed to materialize, Congress adopted a different approach. In enacting ERISA, Congress decided to sweep away the hodgepodge of state laws regulating ERISA plans and to "establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (footnote omitted). Petitioners' assertion that Congress intended to immunize "traditional exercises of state authority" from preemption under ERISA (State Gov. Br. at 8) cannot be reconciled with this history.

Language — Petitioners' immunity theory also conflicts with the language of ERISA. As this Court has recognized, ERISA's preemption clause is "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). The clause provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). The clause makes no distinction between laws that regulate government contractors and laws that do not. As a consequence, to paraphrase this Court, "there is simply no logical way to construe the English language so that [state] laws 'relate to' benefits plans when they [regulate government contractors], but not when they [regulate purely private sector employers]." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836 (1988) (quotation omitted). If a state law regulates an ERISA plan, it "relate[s] to" that plan whether or not the plan is operated by a government contractor. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.") (footnote omitted).

This conclusion is confirmed by the specific exemptions in the preemption clause. ERISA exempts from preemption state laws regulating insurance, banking, and securities, as well as "[g]enerally applicable criminal law[s]" 29 U.S.C. §§ 1144(b)(2)(A) & (b)(4). There is, however, no exemption for state laws regulating government contracting. "In a comprehensive regulatory scheme like ERISA, such omissions are significant ones." *Mackey*, 486 U.S. at 837; see also *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (rejecting any "assumption of inadvertent omission" in ERISA). That a statute as comprehensive as ERISA specifically exempts from preemption state laws regulating certain areas of traditional concern demonstrates Congress' intention *not* to exempt state laws regulating other areas. See 2A N. Singer, *Sutherland on Statutory Construction* § 47.23, at 217 (5th ed. rev. ed. 1992) ("The enumeration of exclusions from the operation of a statute

indicates that the statute should apply to all cases not specifically excluded.”) (footnote omitted).

Purpose — An immunity for state laws regulating government contracting would also conflict with the purposes underlying ERISA’s preemption clause. The preemption clause was not, as some *amici* have suggested (*see* State Gov. Br. at 5, 11), merely intended to eliminate conflicting state regulations. An express preemption clause is not needed to do that. *See, e.g., English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). ERISA’s broad preemption clause was designed instead to “minimize the administrative and financial burden” of complying with a variety of different regulations, a burden that is felt even in the absence of conflicting regulations. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

As this Court has recognized, the most efficient way to administer a benefits program is “to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.” *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.

Id. at 9 (citation omitted). Accordingly, ERISA’s preemption clause is designed to “afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations.” *Id.*; *see also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677-78 (1995) (“The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit

the nationally uniform administration of employee benefit plans.”) [hereinafter, *Travelers*].

An exemption for state laws regulating government contracting would directly undermine this goal. If each and every state and local government could regulate the ERISA plans of the companies with which they do business, those companies would be subject to the very patchwork of regulation that Congress intended the preemption clause to eliminate. Indeed, under Petitioners’ theory, companies would not only face potentially differing regulation from the federal government and a multitude of state and municipal governments; they might also be forced to distinguish between their public and private sector operations. Plainly, such a “patchwork scheme of regulation would introduce considerable inefficiencies.” *Fort Halifax*, 482 U.S. at 11. Moreover, as state and local government procurement constitutes approximately 9% of the gross domestic product, *see Statistical Abstract of the United States* 451 (115th ed. 1995), the adverse effects of such inefficiencies would be felt throughout the economy.

The immunity that Petitioners propose would also inevitably generate litigation. There would be suits over how exactly to draw the line between public contracting and purely private sector activity. There would also be suits over whether to extend any immunity for laws regulating public contracting to laws regulating other areas of traditional state concern. A subsidiary purpose of ERISA’s preemption clause was, however, to avoid “endless litigation over the validity of State action that might impinge on Federal regulation.” *Shaw*, 463 U.S. at 99 n.20 (quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)). Recognizing an immunity for state laws regulating government contracting would undermine this purpose as well.

B. This Court Has Not Recognized Any General Immunity From Preemption For State Laws Regulating Government Contracting.

In *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986), this Court

considered whether the NLRA preempted a Wisconsin law barring three-time violators of the NLRA from state contracting. The Court found that the Wisconsin law conflicted with the NLRA by providing remedies not available under the statute. *See* 475 U.S. at 286 (noting that in a complex federal scheme such as the NLRA “conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy”) (quotation omitted). This Court therefore held the Wisconsin law preempted. *See id.* at 286-87.

Although the Wisconsin law plainly regulated government contracting, this Court did not suggest that the Wisconsin law was immune, presumptively or otherwise, from preemption. To the contrary, this Court expressly rejected the State’s argument that the law escaped preemption because it was an exercise of the State’s spending power. *See Gould*, 475 U.S. at 289-91. In this Court’s view, “That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when two separate remedies are brought to bear on the same activity.” *Id.* at 289 (quotation omitted). By the same token, that California’s prevailing wage law regulates public contracting does not significantly lessen the potential that the law will “relate to” an ERISA plan. Accordingly, the fact that a state law which relates to an ERISA plan also regulates government contracting should make no difference for purposes of ERISA’s preemption clause.

Neither Petitioners nor their *amici* discuss — much less attempt to distinguish — this Court’s decision in *Gould*. They rely instead upon this Court’s recent decision in *Travelers*. Based upon a single passage from that opinion,³ Petitioners and their

³ The passage in question states:

where federal law is said to bar state action in fields of traditional state regulation, we have worked on the “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”

amici contend that all state laws regulating traditional areas of local concern are presumptively immune from preemption. *See* Pet. Br. at 21, 23; State Gov. Br. at 8-10. *Travelers* establishes no such presumption.

In *Travelers*, a group of commercial insurers challenged a New York law regulating the rates for in-patient hospital care and imposing a 13% surcharge on commercial insurers. *See* N.Y. Pub. Health Law § 2807-c(1)(b) (McKinney 1993 & Supp. 1996); *see also id.* §§ 2807-c(2-a) & 11(i) (imposing additional surcharges during 1993). The Second Circuit held that the surcharge law “relate[d] to” an ERISA plan (and was therefore preempted by ERISA) because the law encouraged ERISA plans and other purchasers of insurance to choose non-profit insurers such as Blue Cross/Shield over commercial insurers by increasing the cost of commercial insurance. *See Travelers*, 115 S. Ct. at 1675-76. This Court unanimously reversed. In its view, the surcharge law did not “bear the requisite ‘connection with’ ERISA plans to trigger pre-emption.” *Id.* at 1680.

Contrary to Petitioners’ suggestion, *Travelers* did not start with the presumption that the surcharge law was immune from preemption because it regulated an area of traditional local concern. This Court began instead with the text of ERISA’s preemption clause and the “objectives of the ERISA statute.” *Travelers*, 115 S. Ct. at 1677. It found neither dispositive because the surcharge law neither referred to nor directly affected an ERISA plan. The law instead had at best an “indirect economic effect” on ERISA plans. *Id.* at 1679. Indeed, this Court observed, there was “nothing remarkable” about the law’s effect on plan administrators. *Id.*; *see also id.* (noting that the surcharge law did “not bind plan administrators to any particular choice”). As a consequence, to find New York’s surcharge law preempted, this Court would have to find all state laws regulating health care costs preempted as well. *See id.* at 1680. Since

Travelers, 115 S. Ct. at 1676 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (other citations omitted).

"nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which has historically been a matter of local concern," this Court refused to do so. *See id.* (citations omitted); *see also id.* at 1681-82 (noting that any other interpretation would conflict with the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225).

There is no suggestion in *Travelers* that state laws referring to ERISA plans or directly affecting their administration are immune from preemption when those laws regulate areas of traditional state concern. Nor could there be. As demonstrated above, *see supra* pp. 6, 8-9, the very purpose of the preemption clause was to sweep away state laws regulating ERISA plans and ensure uniform federal regulation of plan administration. Moreover, the inclusion of specific exemptions for certain areas of traditional state regulation from preemption precludes implication of further exemptions. *See supra* pp. 7-8. As a consequence, the presumption that Congress did not intend to bar all state action in fields of traditional state regulation has only limited application under ERISA. It plays a role only where, as in *Travelers*, a state law does not refer to ERISA plans and the law's only effect on those plans is indirect. Thus, while the presumption may help to define the outer reaches of ERISA's preemption clause, it plainly does not immunize traditional state laws from preemption when they refer to or directly affect ERISA plans.

II. CALIFORNIA'S PREVAILING WAGE LAW CANNOT BE SAVED BY CHARACTERIZING IT AS PROPRIETARY.

Before the Ninth Circuit, Petitioners argued that their conduct was proprietary and therefore not subject to preemption. The Ninth Circuit rejected this argument, *see Dillingham Constr., N.A., Inc. v. County of Sonoma*, 57 F.3d 712, 721-22 (9th Cir. 1995), and Petitioners have not advanced this theory in either their petition for *certiorari* or their brief on the merits. As a consequence, despite the fact that some *amici* have addressed this

issue,⁴ this Court should decline to do so. *See United States v. IBM*, 116 S. Ct. 1793, 1801 (1996); *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747, 1755 (1994).⁵ If, however, this Court does consider the proprietary conduct argument, it should reject the argument because ERISA's preemption clause does not contain any exception for proprietary conduct and because the prevailing wage law is, in any event, not proprietary.

A. ERISA's Preemption Clause Does Not Contain An Exception For Proprietary Conduct.

ERISA's preemption clause neither contains nor permits an exception for proprietary conduct that would allow states to dictate the terms of the ERISA plans operated by their government contractors. The preemption clause applies to "any and all State laws" that relate to ERISA plans. 29 U.S.C. § 1144(a). Furthermore, the term state law is defined expansively for purposes of the preemption clause: according to a special definition applicable to the preemption clause, the term state law "includes all laws, decisions, rules, regulations, or other State action having the effect of law." *Id.* § 1144(c)(1). While some individual purchasing decisions might fall outside this definition, California's prevailing wage law plainly does not because it undoubtedly has "the effect of law." Before the Ninth Circuit,

⁴ The AFL-CIO raised the proprietary conduct argument in its brief in support of the petition (*see* Brief of the AFL-CIO in Support of Petition at 15-20), and the Associated General Contractors, in anticipation of a similar argument on the merits, opposed the argument in their brief on the merits (*see* Brief of the Associated General Contractors of America at 18-22). Ultimately, however, the AFL-CIO chose not to argue for a proprietary conduct exception in its brief on the merits.

⁵ This Court should also decline to address the proprietary conduct argument because it does not fall within the scope of the question presented. *See* Pet. i (asking whether Congress intended to preempt "states' traditional regulation of wages, apprenticeship and state-funded public works construction when expressed in a state prevailing wage law") (emphasis added).

Petitioners nonetheless argued that this Court's decision in *Building & Construction Trades Council of the Metropolitan Dist. v. Associated Builders & Contractors of Mass./Rhode Island*, 507 U.S. 218 (1993) [hereinafter, *Boston Harbor*], supports a proprietary conduct exception. See *Dillingham*, 57 F.3d at 721. While *Boston Harbor* did recognize a distinction between regulatory and proprietary conduct, it did so under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, not ERISA. Moreover, this Court's reasoning in *Boston Harbor* is not in any way applicable to ERISA.

In *Boston Harbor*, a Massachusetts state agency was under a court-imposed deadline to bring Boston Harbor into compliance with the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* See *Boston Harbor*, 507 U.S. at 220-21. To prevent labor unrest from jeopardizing the agency's ability to meet this deadline, the agency entered into a "pre-hire" agreement with a local union requiring, among other things, that contractors and subcontractors on the project use unionized workers. See *id.* at 221-22. A group of contractors and subcontractors challenged the agreement, arguing that it was preempted by the NLRA. This Court disagreed. It found that the agency, in entering into an agreement "specifically tailored to one particular job," was "act[ing] just like a private contractor would act," and was "therefore subject to neither" of the NLRA preemption principles invoked by the contractors and subcontractors. *Id.* at 232-33 (quotation omitted).

In so holding, this Court did not suggest that an exception for proprietary conduct should be carved out from other statutes. Recognizing that the NLRA "contains no express preemption clause," this Court reasoned that a proprietary conduct exception was "consistent with [the] NLRA preemption principles" invoked by the plaintiffs. *Boston Harbor*, 507 U.S. at 224, 230. The first of these principles, known as *Garmon* preemption, forbids state and federal courts from interfering with the National Labor Relations Board's primary jurisdiction to determine whether activities are prohibited or protected by the NLRA. See *id.* at 224-25; see generally *Sears, Roebuck & Co. v. San Diego Dist.*

Council of Carpenters, 436 U.S. 180, 190-212 (1978). The second principle, known as *Machinists* preemption, forbids interference with the use of strikes, lockouts and other forms of economic pressure during collective bargaining. *Boston Harbor*, 507 U.S. at 226 (quotation omitted); see generally *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144 (1976) (noting that Congress intended the collective bargaining process to be "left for the free play of contending forces") (quotation omitted).

The pre-hire agreement in *Boston Harbor* did not conflict with the principles underlying either *Garmon* or *Machinists* preemption. The agreement did not intrude upon the NLRB's exclusive jurisdiction. Nor did it interfere with the free play of economic forces. Indeed, in this Court's view, the state agency's decision to enter into a pre-hire agreement "exemplifie[d]" the operation of market forces. *Boston Harbor*, 507 U.S. at 233 (quotation omitted). Accordingly, this Court found that the NLRA did not preempt the pre-hire agreement. See *id.* at 232-33.

The situation here is quite different. ERISA, unlike the NLRA, has a preemption clause. Unlike *Garmon* and *Machinists* preemption, the clause is not designed to protect the primary jurisdiction of any administrative agency or to preserve any portion of pension regulation for the free play of economic forces. ERISA preemption is designed to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Travelers*, 115 S. Ct. at 1677-78. Exempting conduct, proprietary or otherwise, that imposes administrative burdens upon ERISA plans operated by government contractors would frustrate this purpose. As a consequence, ERISA cannot be interpreted to contain any exemption from preemption for proprietary conduct that would allow the states to dictate the terms of ERISA plans operated by their government contractors.

B. The Prevailing Wage Law Is Regulatory, Not Proprietary.

Even if there were some basis for exempting proprietary conduct from preemption under ERISA, that exemption would not apply here because the conduct at issue in this case is not proprietary under *Boston Harbor*.⁶

First, unlike the pre-hire agreement in *Boston Harbor*, California's prevailing wage law is not a contractual provision "specifically tailored to one particular job." *Boston Harbor*, 507 U.S. at 232. California's prevailing wage statute is a law, duly enacted by the California legislature, and it is contained in California's *labor*, not its public contracting, code. See Cal. Lab. Code § 1777.5. Furthermore, the prevailing wage law applies even where the contracting agency has failed to incorporate its terms into the agreement with the government contractor. See *Lusardi Constr. Co. v. Aubry*, 824 P.2d 643, 648-50 (Cal. 1992) (en banc). Thus, the prevailing wage law is an exercise of governmental power, and therefore regulatory rather than proprietary in nature. Cf. *Gould*, 475 U.S. at 290 (noting that government conduct is subject to "special restraints" because "government occupies a unique position of power in our society").

Second, there has been no showing here that the State of California was "acting as a typical proprietor" when it enforced its prevailing wage law. *Boston Harbor*, 507 U.S. at 229. The prevailing wage law requires contractors to pay apprentices "the standard wage paid to apprentices," to provide them with "training under apprenticeship standards and written apprentice agreements," and to employ at least "one apprentice for each five

⁶ In *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332-39 (D.C. Cir. 1996), the United States Court of Appeals for the District of Columbia Circuit held that an Executive Order prohibiting employers who use permanent replacement workers from contracting with the federal government was regulatory, not proprietary, and therefore invalid under the NLRA.

journeymen." Cal. Lab. Code § 1777.5. Although *amici*'s members include thousands of United States businesses, *amici* are unaware of any private business that imposes similar requirements. In fact, it defies common sense to suppose that private businesses would routinely impose such expensive and inefficient requirements on their contractors. As a consequence, unlike the pre-hire agreement in *Boston Harbor*, the restrictions at issue in this case cannot be deemed typical of the private sector.

Third, California's prevailing wage law furthers regulatory, not proprietary, interests. The prevailing wage law is not designed to further California's interest in economic and efficient procurement. Indeed, as the California Supreme Court has recognized, contracting agencies often "have strong financial incentives not to comply with the prevailing wage law." *Lusardi*, 824 P.2d at 649. The primary purpose of the prevailing wage law is instead "to protect and benefit employees on public works projects." *Id.* at 648. As this purpose is plainly regulatory, California's prevailing wage law should be deemed regulatory rather than proprietary in nature. See, e.g., *Gould*, 475 U.S. at 289-91.

CONCLUSION

For the reasons stated above, this Court should reject Petitioners' suggestion that state laws governing government contracting are immune from preemption under ERISA.

Respectfully submitted,

Of Counsel

STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER,
INC.
1615 H Street, N.W.
Washington, DC 20062-2000
(202) 463-5337

TIMOTHY B. DYK
(Counsel of Record)
DANIEL H. BROMBERG
JONES, DAY, REAVIS &
POGUE
1450 G St., N.W.
Washington, DC 20005
(202) 879-3939

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
North Tower, Suite 1500
Washington, D.C. 20004-1790
(202) 637-3058

*Counsel for the Chamber of
Commerce of the United
States of America and the
National Association of
Manufacturers*

August 1, 1996

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No. 95-789

Supreme Court, U. S.

F I L E D

In The

AUG 1 1996

Supreme Court of the United States

October Term, 1995

**STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS; COUNTY OF SONOMA,**

Petitioners,

vs.

**DILLINGHAM CONSTRUCTION, N.A., INC.; MANUEL
J. ARCEO, dba SOUND SYSTEMS MEDIA,**

Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit*

**BRIEF OF ASSOCIATED BUILDERS AND
CONTRACTORS, INC., GOLDEN GATE AND
SIERRA NEVADA UNILATERAL APPRENTICE-
SHIP COMMITTEES, AIR CONDITIONING
TRADES ASSOCIATION, INC., INDEPENDENT
ROOFING CONTRACTORS OF CALIFORNIA,
INC., WALTHER ELECTRIC COMPANY AND
THE ABC NATIONAL POWER LINE ERECTOR
UNILATERAL APPRENTICESHIP COMMITTEE
AS AMICI CURIAE IN SUPPORT
OF RESPONDENTS**

MARK R. THIERMAN

Counsel of Record

GEORGE P. PARISOTTO

THIERMAN LAW FIRM

Attorneys for Amici Curiae

120 Green Street

San Francisco, California 94111

(415) 391-9200

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8 Cal. Code of Regulations § 208	10
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APPENDIX

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INTEREST OF AMICI CURIAE

This brief¹ is being filed jointly by six state or federally approved unilateral apprenticeship committees.² These committees are sponsored by trade organizations comprised of construction contractors who are not signatory to a collective bargaining agreement with labor organizations belonging to the Building Trades Department of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and the programs represent literally thousands³ of participant apprentices who would be denied the opportunity to work and train on state and local public works projects if the State of California prevails in its attempt to regain the power to deny apprenticeship opportunities to those enrolled in programs it will not approve.⁴ These programs, all of whom were forced to undergo extensive administrative appeals and subsequent litigation in order to become approved in their respective states, owe their entire existence and success to the various decisions and opinions of the United States Court of Appeals for the Second, Eighth, Ninth and Tenth Circuits, as well as the California Supreme Court, correctly applying the preemption

1. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Court Rule 37.3.

2. There are now over 17,000 trainees in ABC programs.

3. The ABC Golden Gate Unilateral Apprenticeship Committee is also the Plaintiff in the companion case of *Associated Builders and Contractors, Inc. v. Curry*, 68 F.3d 342 (9th Cir. 1995), which was not appealed to the Supreme Court and is law of the case as to those programs. For this reason also, Amici believe certiorari was improvidently granted.

4. The Court is also invited to consider the dismal record of non-union apprenticeship discrimination first addressed by this Court in 1988 with the reversal of the Ninth Circuit in *Washington State Electrical Contractors Assn. v. Forrest*, 488 U.S. 806 (1988), and in *Local Union 598 v. J.A. Jones Construction Co.*, 846 F.2d 1213 (9th Cir.), *aff'd summ.*, 488 U.S. 881 (1988), and, which was finally approved based upon the logic of the Ninth Circuit's opinion in this action, *Inland Empire Chapter of ABC v. Dear*, 78 F.3d 593 (9th Cir. 1996).

provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), to invalidate state prevailing wage law which allows only a California "approved" apprenticeship program to follow its standards on public works construction, while denying federally approved, other state approved and non-approved programs the right to follow their standards or to adopt the approved programs standards on public works.⁵

Pursuant to their fiduciary duties under ERISA, and in the sole and exclusive interests of the employee benefit plan's participants (the apprentices), Amici urge the Supreme Court to reject this belated attempt by the State of California to reverse the decisions by the Ninth Circuit Court of Appeals in *Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 112 L. Ed. 2d 46 (1990) and *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 120 L. Ed. 2d 869 (1992), as well as the California Supreme Court's decision in *Southern Calif. Chpt. of Associated Builders and Contractors v. California Apprenticeship Council*, 4 Cal. 4th 422 (1992). Despite the State of California and the Building Trades Department of the AFL-CIO's failed attempt to repeal ERISA preemption over program content in H.R. 1036 and S.B. 1580, the State of California brings this appeal solely to re-establish the Building Trades Department's past monopoly position over apprenticeship training, denying non-union apprenticeship program participants the ability to train and work on public works construction.⁶ With three federal agencies (Bureau of

5. Amici's position is also supported by the Coalition for the Preservation of ERISA Preemption ("COPEP"), the members of which are listed in a June 15, 1993 letter to Secretary of Labor Robert Reich in opposition to H.R. 1036. See Appendix A.

6. Some of the skills necessary to become a journey level craft person can only be gained on public or quasi-public construction, such as wiring for radar control circuits at an airport, or specialized pipe construction for nuclear industries.

Apprenticeship and Training, Pension Benefits Welfare Administration and Wage-Hour Division of the United States Department of Labor) regulating ERISA training programs, and a specific grant of private causes of action by the Secretary of Labor and any "participant, beneficiary or fiduciary" under 29 U.S.C. § 1132, for failure to provide adequate training or otherwise follow the plan documents, the State of California's attempt to add yet another layer of regulation cannot justify the obvious and intended harm to the stated goal of national standards for benefit plans articulated under ERISA and a national standard for training excellence articulated by the National Apprenticeship Act, 29 U.S.C. § 50 (commonly known as the Fitzgerald Act). Even the State of California's mischaracterization of the facts in this action should not cause this Court to overturn the Ninth Circuit's decision, which promotes the goal uniform, a national apprentices standards and the Fitzgerald Act's implementing regulations at 29 C.F.R. Part 29.

The Associated Builders and Contractors, Inc., Golden Gate Chapter Unilateral Apprenticeship Committee is an employee benefit plan organized and operating pursuant to the provision of 29 U.S.C. § 1001 *et seq.*, which trains over 130 apprentices throughout Northern California in the Electrical, Plumbing, Carpentry, and Laborers crafts, not including students in pre-apprenticeship programs for math improvement offered to disadvantage youth in Oakland, California, and those enrolled in English as a second language courses taught concurrently with the regular apprenticeship programs.⁷ ABC Golden Gate is also

7. ABC Golden Gate also has similar programs approved by the Bureau of Apprenticeship and Training of the United States Department of Labor. However, the State of California refuses to allow people enrolled in these federal programs to be employed according to the programs' wage rates on public works projects, so that the programs participants denied public works opportunities are not being utilized. The State of California also refuses to

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the Plaintiff in the case of *ABC v. Curry, supra*, which was related to this action by the United States District Court, Northern District of California, and subsequently decided by the Ninth Circuit, but from which no appeal or petition for certiorari was filed.

ABC's Sierra Nevada Chapter Unilateral Electrical, Plumbing, Painting, Carpentry, Drywall/Lather, and Laborer apprenticeship committees operates both State of Nevada approved and federally approved apprenticeship training programs pursuant to a permanent injunction issued by the United States District Court and upheld by the Ninth Circuit Court of Appeals for the Ninth Circuit in the case of *Electrical Joint Training Committee v. MacDonald, supra*. Only after this Court denied certiorari of the decision upholding the District Court's injunction (the District Court opinion is reported at 731 F. Supp. 966) forcing the State of Nevada to allow BAT approved training programs to follow their standards on state public works projects did the State of Nevada began approving non-union programs in the construction industry. Because the State of Nevada started approving programs, BAT program approval is no longer available for new programs except those that operate exclusively in federal enclaves.⁸ There are approximately 88 apprentices currently training in the programs sponsored by the Sierra Nevada Chapter of ABCs. The Sierra Nevada Chapter of

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allow the ABC Golden Gate Laborers program to operate on prevailing wage projects despite its state approval since California state regulations require all non-union programs to pay union apprenticeship rates on public works projects and the State cannot determine the "prevailing" union rate for laborer apprentices.

8. If the decision of the Ninth Circuit in this action is reversed, *Hydrostorage* and *MacDonald* will no longer be valid, which means that BAT approved programs, such as those approved on Indian lands and in other states that do not have a state apprenticeship council (like Utah), will no longer be able to operate on Nevada public works construction projects.

ABC Electrical Training Program is now the largest and most successful construction craft apprenticeship program in Nevada, the second largest being the Southern Nevada Chapter ABC Electrical Training Program.

The Air Conditioning Trades Association, Inc. ("ACTA") is a non-profit trade association representing contractors in the State of California who specialize in heating, ventilation, and air conditioning. ACTA sponsors its own apprenticeship program which provides training for journeymen sheet metal workers. The ACTA unilateral apprenticeship program was initially denied state approval by the California Apprenticeship Council ("CAC"). However, subsequent litigation resulted in the CAC reversing their decision by order of the California Court of Appeal, First Appellate District. Despite the order of the Court of Appeals, and the October 12, 1995 Department of Industrial Relations' policy memoranda (attached hereto as Appendix B), which abandoned artificial geographic restrictions simply to protect the territory of other apprenticeship programs, the State of California has started imposing geographic and other non-Fitzgerald Act restrictions on the program once certiorari was granted in this case.⁹

The Independent Roofing Contractors of California, Inc. ("IRCC") is a non-profit trade association representing roofing contractors in Northern California. The IRCC sponsors its own apprenticeship program which provides training for roofers.

9. See July 2, 1996 letter from the Division of Apprenticeship Standards regarding training in Fresno, attached hereto as Appendix C. Since the physics of air conditioning in Sacramento are the same 150 miles to the south in Fresno, these artificial restrictions on training are purely designed to create or preserve make believe competitive advantages held by union programs operating in Fresno. Learning is not a limited resource and there is not a natural monopoly over education; there is no demonstrable evidence that the existence of a non-union program training fifty to one hundred apprentices will adversely impact the central California construction market of hundreds of thousands of workers. See, e.g. *So. Cal ABC, supra*, 4 Cal. 4th 422.

Like the ACTA program, the IRCC unilateral apprenticeship program was first denied approval by the California Apprenticeship Council, despite its approval by the federal BAT.¹⁰ Subsequent litigation resulted in the CAC approving the IRCC program by order of the Superior Court of the State of California, in and for the City and County of San Francisco. There are approximately 220 apprentices training in this program currently, the vast majority of whom are members of ethnic minority groups, and much of the work is conducted with simultaneous translations into other languages.

The Walther Electric Company ("Walther") is a electrical construction contractor located in the town of Ceres, California. Walther is not signatory to a collective bargaining agreement with any labor organization representing the company's employees. Walther sponsors its own state approved apprenticeship program which trains the employees of Walther to become certified journeymen electricians. Litigation following the CAC's initial rejection of the Walther program resulted in later CAC approval by order of the California Court of Appeal, First Appellate District. The hardship of obtaining state approval for its apprenticeship program was the subject of Congressional inquiry and was one of the reasons for the defeat of H.R. 1036. See 103 Cong. 1st Sess., 139 Cong. Rec. 8965-8966.

ABC National Power Line Erectors Unilateral Apprenticeship Committee is approved by Region 4 of the Federal Bureau of Apprenticeship and Training as well as the State of Florida, which is the location of its administrative headquarters. Power line construction, also known as outside wireman's work, usually involves a project spanning several States at the same time. Because the transient nature of the

10. Of course, California refused to recognize the program's BAT approval on State prevailing wage projects, forcing IRCC and ACTA to seek state approval.

project precludes any "permanent" training facility, the ABC National Power Line Erectors training program operates throughout the United States by establishing mobile apprenticeship classrooms that follow the contractor's workforce, using the contractors' supervisors and journey people as its instructors, and a nationally BAT approved set of videos and text books for the classroom instruction portion of the training. One of the program's subscribing members is Irby Construction, the world's largest powerline construction company.¹¹ There are approximately 280 apprentices in this ABC program. As can be seen from the case of *ABC National Line Constructors v. Aubry*, 68 F.3d 343 (9th Cir. 1995), the State of California refused to allow contributions to this program to count towards the mandatory apprenticeship contribution requirements of the State's Prevailing Wage Laws, and refuses to recognize apprentices in this program working in California as "approved" for purposes of the California Labor Codes' mandatory apprenticeship employment requirements.

SUMMARY OF ARGUMENT

For thousands of years, workers have learned their craft by the apprenticeship method. From Biblical times, to the guild system, to the new deal acceptance of the modern labor movement in the United States in the 1930's, the apprenticeship

11. Despite cries of "lowering apprenticeship standards" the apprenticeship program at issue in Dillingham, and all ABC programs, use federally approved national training materials and a nationally BAT approved curriculum. Like most construction industry programs, the ABC programs and the program in Dillingham do not have classroom work (called related and supplemental instruction) during the summer months, but there was never any challenge to the educational content of its apprenticeship training syllabus, since all apprenticeship programs use the same core curriculum approved nationally by BAT for that craft. ABC's textbooks and lecture notes, marketed by Prentice-Hall under the trade name of "Wheels of Learning," were adopted in 37 states as the required "school to work" vocational trade training program in most construction crafts.

system has successfully trained the majority of construction workers in the United States and abroad. Apprenticeship differs from other educational systems because apprenticeship requires an agreement (called indenture) between the student-worker (an apprentice), the employer-instructor (master or contractor), and the accrediting agency (guild, union, or trade association) whereby the apprentice exchanges his or her labor at lower than market rates for instruction and a chance to work in the masters' shop. The master craftsman is both the teacher and the employer, responsible for the health and welfare of the apprentice during the term of his or her indenture. The combination of all the employers/masters act as a governing board to supervise the level of skill, education and working conditions of the apprentices. Historically, the governing body was the craft guild, later the craft union, and, after the Taft-Hartley Amendment to the National Labor Relations Act (29 U.S.C. § 186) prohibited employer participation in union activities, an employer only or joint (union and employer sponsored) apprenticeship committee.¹² Since both the Taft-Hartley amendments to the National Labor Relations Act, and ERISA require the detail terms of the apprenticeship benefit plan to be set forth in writing, called the program's "standards," and since the payment for labor in exchange for education is the essence of the apprentice program, apprenticeship is perhaps the only employee benefit plan where wages are specially made an essential part of the plan and are expressed in the plan documents. To regulate the wages contained in the standards, other than the imposition of a uniform minimum wage applicable

12. Like many states that regulate apprenticeship, California once would only approve programs run by "joint" apprenticeship committees. This practice effectively barred all non-union programs from participation, since it would be an unfair labor practice under the National Labor Relations Act to create and recognize employees representatives without any union or employee support. Federal regulations recognize employer only apprenticeship committees, called Unilateral Committees, in 29 C.F.R. Part 29.2(i).

to all employees, is to control the substance of the apprenticeship program.

The California Prevailing Wage Laws, California Labor Code § 1770, *et seq.*, sets the minimum wages that contractors must pay workers employed on public works construction.¹³ Public works contractors are allowed only to utilize "state approved" apprentices on state and local public works projects but must compensate such apprentices according to "the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed." Cal. Labor Code § 1777.5.¹⁴ The apprentice wage, which is found in the standards of every apprenticeship program (see 29 C.F.R. § 29.5(5); Title 8, California Code of Regulations § 212(c)(7)), and, for public works, is derived from the journeyman union prevailing wage rate (8 Cal. Code of Regulations § 230.1(b)), is lower than the prevailing wage which is required to be paid to each journeyman workers on state projects because requiring the employer to pay the full rate will preclude use of lesser skilled employees on the

13. Unlike the situation of a public entity engaged in essentially a market participant activity, apprenticeship and prevailing wages are regulations of state-wide concern and do not emanate from nor are they modifiable by the "building entity". Regulation of apprenticeship is administered by a State of California agency independent, and often opposed to, the public agency building the project. Thus, the reasoning articulated in the case of *Building and Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. ___, 113 S. Ct. 1190 ("Boston Harbor") has consistently been rejected in California and other apprenticeship cases.

14. Unlike federal rules which permit the program to establish its own wage rates on public and private works projects, California requires all apprenticeship programs to follow the union apprenticeship rates even though those rates may not correspond to the advancement of the apprentices in the non-union program. For example, several non-union electrical apprenticeship program use a four year curriculum, with more classroom work over a shorter period of time, while the union wage rates set the standards for public works construction based upon a five year program, with less instruction per year.

project. Regardless of the wage rates specified in the ERISA standards of a non-union apprenticeship program, the State of California insists that the apprentices be paid according to the union apprenticeship wage rate. *See, e.g.*, 8 Cal. Code of Regulations § 208. If the apprentice is not indentured with a CAC "approved" program, then he or she must be paid at the full journeyman prevailing wage rate, effectively precluding the use of non-state approved apprentices on all public works construction.

This scheme of state interference with apprenticeship training is and should be preempted by ERISA. Apprenticeship and training programs are expressly defined under ERISA as employee welfare benefit plans. *See* 29 U.S.C. § 1002(1). The California Prevailing Wage scheme at issue in this case clearly "relates to" and has a connection with apprenticeship and training plans since they favor one type of ERISA plan, those apprenticeship programs approved by the CAC, over other ERISA plans. For example, if an apprenticeship program is approved in the State of Utah by the United States Department of Labor, Bureau of Apprenticeship and Training ("BAT"), the apprentices indentured in that program cannot work on a California public works project and be paid an apprentice rate. The apprentice wage exemption will not be granted under the California prevailing wage laws even though the Utah program was approved under the *same federal criteria* as California apprenticeship programs.¹⁵ If one of ERISA's goals is to

15. This action only concerns whether ERISA training programs, whether approved by the CAC or not, are entitled to the apprentice wage exemption under the California prevailing wage laws. It does not concern the validity of state laws establishing apprenticeship approval criteria separate and apart from the criteria set forth in the Fitzgerald Act regulations, 29 C.F.R. Part 29. All courts considering that issue have found such state laws preempted by ERISA. *See, e.g.*, *Electrical Joint Apprenticeship Committee v. MacDonald*, *supra*; *Southern Calif. Chpt. of Associated Builders and*

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eliminate the "patchwork scheme of regulations" so that benefit plans would operate under a single set of laws, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10-11 (1987), then the California Prevailing Wage Law, which prevents the attainment of this goal by granting one ERISA plan preferential treatment over other, similar plans, must be preempted.

Further, the prevailing wage law relate to ERISA plans by mandating the wages which must be paid to apprentices on state public works projects. Apprenticeship programs are unique among welfare benefit plans in that they include a progressive wage scale as an essential component of the plan or program. *See* 29 C.F.R. § 29.5 (5). By mandating that apprentices from "non-favored," or non-approved programs be paid the full journeyman prevailing wage rate on public works projects, the State is forcing programs to change their wage structure and compensate apprentices at a level which is not commensurate with their skills. The wage rates are specified by the sponsor and approved by BAT, or in cases of state approved programs, the State Apprenticeship Council ("SAC"), as agent for BAT. As agents for BAT, SACs may discipline and even deregister programs which fail to meet the approved standards, or otherwise violate federal apprenticeship regulations. *See Joint Apprenticeship and Training Counsel of Local 363 v. New York State Dept. of Labor*, 984 F.2d 589, 591 (2nd Cir. 1993).

For several reasons, California's use of its prevailing wage laws to regulate apprenticeship cannot be considered "saved" under ERISA's savings clause, 29 U.S.C. § 1144(d). First, there is no traditional state interest in regulating benefit programs, only wages, and the California Prevailing Wage Laws clearly

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Contractors v. California Apprenticeship Council, *supra*; and, more recently, *Associated General Contractors v. Smith*, 74 F.3d 926 (9th Cir. 1996).

attempt to regulate both. *See WSB Electric, Inc. v. Curry*, __ F.3d __, 1996 U.S. App. LEXIS 16027, 96 Cal. Daily Op. Service 5077 (9th Cir. 1996). Second, that a state law represents a traditional exercise of a state's police power, or regulates an area of traditional state concern, is of no matter when the law relates to ERISA plans. As such, the fact that the State of California has previously "regulated" apprenticeship through its prevailing wage laws is of no concern because the law relates exclusively to ERISA plans. Third, power once delegated cannot be redelegated, and the delegation of power, if any, by the federal BAT to a SAC pursuant to 29 C.F.R. Part 29 does not include any enforcement power to be delegated to another branch of state government. *See, generally, Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942). The federal Fitzgerald Act, 29 U.S.C. § 50, and its regulations at 29 C.F.R. Part 29,¹⁶ do not confer authority upon California's Department of Industrial Relations or Division of Labor Standards Enforcement to use the prevailing wage laws as a method of regulating apprentices indentured in ERISA programs, whether or not these programs are approved by the CAC. If there is any authority to set wages for apprenticeship programs, it is to be found either with BAT or the CAC, and it is to be enforced solely by the sanctions contained in 29 C.F.R. Part 29.

Essentially, the Ninth Circuit's decision in this action promotes and encourages training rather than create anarchy as described by Petitioners and various *amici* supporting Petitioners. Allowing the apprentice wage exemption to all ERISA training programs will force the CAC and other State Apprenticeship Councils to apply objective criteria when

16. These regulations are "a detailed regulatory scheme defining apprenticeship programs and their requirements, and establish a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the United States Department of Labor. . . ." *Siuslaw Concrete Const. v. Washington Dept. of Transportation*, 784 F.2d 952, 957 (9th Cir. 1986).

considering the approval of proposed apprenticeship programs and will preclude new laws and regulations which seek to prevent the growth of merit shop training throughout the State of California and the United States in general. By maintaining a stranglehold over public works construction, an area which provides essential and unique work experiences for an apprentice, the State simply seeks to force both approved and non-approved programs to conform with restrictive and burdensome regulations that cannot find their genesis in existing federal apprenticeship law. *See* November 9, 1993 statement by Congressman Fawell, beginning at 103 Cong. 1st Sess., 139 Cong. Rec. 8964, in opposition to amendments to overrule ERISA preemption of apprenticeship, H.R. 1036. As stated by Congressman Ballenger, at 8966, "The direct targets of this legislation are open shop contractors expanding into previously union-dominated territory, and the real victims, however, are the women, minorities, and young people who will be denied training opportunities." ERISA preemption, and the Ninth Circuit's *Dillingham* decision, will prevent such bureaucratic roadblocks that discourage, and not encourage, apprenticeship and on-the-job training.

ARGUMENT

I.

THIS PORTION OF CALIFORNIA'S PREVAILING WAGE LAW RELATES EXCLUSIVELY TO ERISA PLANS AND THEREFORE IS PREEMPTED BY ERISA.

A. The Expansive Scope Of ERISA Preemption.

ERISA is a comprehensive federal statute whose purpose is to "protect the interest of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans. *Local Union 598 v. J.A. Jones Construction Co.*, 846 F.2d 1213 (9th

Cir.), *aff'd summ.*, 488 U.S. 881 (1988) (quoting *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501 (9th Cir. 1985)). To achieve this goal, Congress enacted ERISA's expansive preemption provision, 29 U.S.C. § 1144(a), which provides that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." "The basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee welfare benefit plans." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, ___ U.S. ___, 115 S. Ct. 1671, 1677-1678 (1995).

ERISA's preemption clause must be applied expansively by the judiciary to ensure uniformity of law governing employee benefit plans. The provision "is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" an employee benefit plan governed by ERISA." *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 112 L. Ed. 2d 356, 364 (1990); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 112 L. Ed. 2d 474, 483 (1990).¹⁷ State laws are subject to preemption if they have a "connection with or reference to" ERISA plans, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), these words being interpreted according to their ordinary, dictionary meaning. *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. 580, 583 (1992). A state law may be subject to preemption even though the law is not specifically designed to affect such plans, or the effect is only indirect. *Ingersoll-Rand*, 133 U.S. at 139. Further, preemption will occur even if the state law is "consistent with ERISA's substantive requirements" or was enacted to "effectuate ERISA's underlying purpose." *Metropolitan Life Ins. Co. v.*

17. State law includes "all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1).

Massachusetts, 471 U.S. 724, 105 S. Ct. 2380, 2388-2389 (1985).¹⁸

Any preemption analysis, whether under ERISA or, for example, the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, is undertaken with the presumption that Congress did not intend to preempt traditional areas of state regulation. *Blue Cross*, 115 S. Ct. at 1676-1677; *see, e.g., Massachusetts v. Morash*, 490 U.S. 107 (1989) (Massachusetts law requiring employers to pay discharged employees full wages, including vacation payments, on the date of discharge not preempted by ERISA). However, due to the expansive text of ERISA, state laws which are determined to "relate to" or have a "connection with" ERISA plans, regardless of whether they can be classified as a traditional exercise of a state's police power, are subject to preemption. *Blue Cross*, 115 S. Ct. at 1677. As correctly stated by the Ninth Circuit in *J.A. Jones*, 846 F.2d at 1220-1221:

In order to avoid preemption, it is not sufficient that a state statute represent the exercise of a traditional state power. *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), *aff'd mem.*, 477 U.S. 901, 106 S. Ct. 3267, 91 L. Ed. 2d 558 (1986) & *aff'd mem. sub nom. Roberts v. Burlington Indus., Inc.*, 477 U.S. 91, 106 S. Ct. 3267, 91 L. Ed. 2d 558 (1986). A purported fundamental state interest is relevant only when there is an element of uncertainty as to whether the challenged state law falls within the scope of the ERISA preemption clause. In cases of uncertainty, our analysis is guided by a

18. State laws which have only a "tenuous, remote, or peripheral" connection with ERISA plans, such as those of general applicability, are not subject to preemption. *Greater Washington*, 113 S. Ct. at 583 n. 1.

rebuttable "presum[ption] that Congress did not intend to pre-empt areas of traditional state regulation." See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985).

However, the strength of the state interest is of no consequence where the state law clearly "purports to regulate" an employee benefit plan. "In order to avoid being preempted, a state law in addition to being an exercise of traditional police powers must also affect the plan 'in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan.' " *Gilbert*, 765 F.2d at 327 (quoting *Shaw*, 463 U.S. at 100 n. 21).

Regarding apprenticeship, courts have generally held that state laws which affect or otherwise relate to apprenticeship training, including the modification of a program's standards, are within the scope of ERISA preemption.¹⁹ In *Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 112 L. Ed. 2d 46 (1990), a California public works contractor was subject to penalties and disbarment from bidding on future state public works because it did not follow state law on a specific project which mandated that all contractors subscribe to an apprenticeship program, utilize apprentices in a set ratio to journeymen hours, and contribute a per hour amount to the fund. The state law was found preempted because it forced the contractor to involuntarily join and fund an employee welfare benefit plan. Similarly, in *Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991), *cert. denied*, 120 L. Ed. 2d 887 (1992),

19. The program's standards establish an apprentice's course of training, the number of hours needed to be spent on various work processes, and a progressive wage scale which is commensurate with the skill levels obtained.

a Minnesota law establishing a minimum jobsite ratio for apprentice pipefitters, whereby a contractor was required to use one journeyman for the first apprentice and three additional journeymen for each additional apprentice, was held preempted by ERISA because the law was designed to affect employee welfare benefit plans by essentially mandating a "minimum" benefit.

B. Apprenticeship Programs Are Employee Welfare Benefit Plans As Defined By ERISA.

The threshold question in this action is whether an apprenticeship program is an employee benefit welfare plan covered by ERISA. The plain text of ERISA is crystal clear. Section 3(1), 29 U.S.C. § 1002 (1), expressly defines the term "employee welfare benefit plan" to include (emphasis added):

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Federal and state courts which have applied this section when determining the validity of state apprenticeship laws have universally found apprenticeship programs to be employee welfare benefit plans governed by ERISA; there has been no finding of an artificial separation between the "funding" mechanism for a program and the actual plan for providing on-the-job training, progressive wages, and supplemental classroom instruction.²⁰ In *Hydrostorage, supra*, 891 F.2d at 727-729, the Ninth Circuit first considered whether apprenticeship standards, those subject to approval by the CAC and California's Division of Apprenticeship Standards ("DAS"), are ERISA-protected employee welfare benefit plans. After reviewing the extensive and comprehensive nature of such standards, which include the duties and procedures of the apprenticeship committee, the minimum qualifications of apprentices, the maximum ratio of apprentices to journeymen on job locations, the terms and conditions of apprenticeships, the hours and wages of apprentices and provisions for supplemental (classroom) instruction and periodic examinations, the Court of Appeals concluded that the standards were undeniably "an integral part" of a larger program, as defined in 29 U.S.C. § 1002(a), for the purpose of providing for its participants . . . apprenticeship or other training programs. 891 F.2d at 728. See also *Boise Cascade, supra*, 939 F.2d at 637; *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555, 1558 (10th Cir. 1992),

20. Amici defines "apprenticeship program" as a course of job training which meets the criteria of 29 C.F.R. Part 29, whether or not the program is approved by the United States Department of Labor, Bureau of Apprenticeship and Training or a State Apprenticeship Council. As a covered ERISA plan, a program must comply with all applicable laws regulating disclosure and fiduciary responsibilities. If a program is not providing adequate training, a "sham" program, it can be sued by either the Secretary of Labor or the apprentices (the beneficiaries) under the provisions of 29 U.S.C. § 1132, disapproved for federal public works by the federal Wage-Hour Division of the United States Department of Labor or enjoined from operation by the Secretary of Labor through the Pension, Benefits and Welfare Plan Administration of the United States Department of Labor.

cert. denied, 121 L. Ed. 2d 331 (1992); *Joint Apprenticeship and Training Counsel of Local 363 v. New York State Dept. of Labor*, 984 F.2d 589, 591 (2nd Cir. 1993); *Southern Calif. Chpt. of Associated Builders and Contractors v. California Apprenticeship Council*, 4 Cal. 4th 422, 436-440 (1992).

There is no justifiable basis to remove any aspect of an apprenticeship program from ERISA's coverage. First, as recognized by this Court, apprenticeship training cannot be viewed together with ordinary conditions of employment subject to state regulations. In *Morash, supra*, 490 U.S. 107, this Court held that an employer's policy of paying its discharged employees for unused vacation time does not constitute an employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1). The Court found that unused vacation pay that would come directly out of the employer's general assets is beyond ERISA's reach because such a benefit is fixed, such as regular wages, and an employee's right to these benefits does not depend upon a future occurrence or subject an employee to a risk different from his/her ordinary employment risk. *Morash*, 490 U.S. at 115-117. The Court then expressly stated that unused vacation pay is directly distinct from other benefits, such as an apprenticeship program (*id.* at 115-116, emphasis added):

Section 3(1) [29 U.S.C. § 1002(1)] subjects to ERISA regulation plans to provide medical, sickness, accident, disability, and death benefits, *training programs*, day care centers, scholarship funds, and legal services. The distinguishing feature of most of these benefits is that they accumulate over a period of time and are payable only upon the occurrence of a contingency outside of the control of the employee.

Apprenticeship programs subject an employee to risks far different from those encountered in "ordinary" employment. For

example, by the imposition of a graduated pay scale consistent with skills acquired by the apprentice, not with the actual job performed (*see* 29 C.F.R. § 29.5(b)(5)), apprentices may find themselves paid at a different rate than other employees performing comparable work. "In order for . . . an apprenticeship program to work, it is essential that the employer be able to pay lesser wages to apprentices while they are in training." *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270, 274 (9th Cir. 1991), *cert. denied*, 120 L. Ed. 2d 869 (1992). Further, apprenticeship standards require related and supplemental instruction beyond the requisite on-the-job training, periodic testing of acquired skills, and a mechanism to transfer apprentices to insure continuous employment and training in all work processes. *See* 29 C.F.R. § 29.5(b)(4), (6), and (13). Confronted with these comprehensive standards and their mandates, an apprentice is thus subjected to risks far beyond that of seeking entitlement to vested benefits, such as unused vacation pay, which are normally associated with "ordinary" employment. This fact was recognized by the California Supreme Court in *Southern Calif. Chpt. of Associated Builders and Contractors v. California Apprenticeship Council*, *supra*, 4 Cal.4th 422, 440:

We believe that it is obvious that an apprentice incurs a risk different from the risk of ordinary employment. The apprentice agrees to accept lower pay and to complete certain educational requirements in order to learn skills which will eventually lead to recognition as a journeyman. If the apprenticeship program goes out of business or if the apprentice is expelled from the program, his investment in the training may be for naught.

Further, there is no regulation issued by the Secretary of Labor which removes an apprenticeship and/or training program

from coverage under ERISA. 29 C.F.R. § 2510.3-1, which is meant to "clarify the definition of the terms 'employee welfare benefit plan' and 'welfare plan' for the purposes of title I of [ERISA]" does not list apprenticeship training as an employment practice which is excluded from ERISA coverage. Correspondingly, 29 C.F.R. § 2510.3-3, which defines "employee benefit plan," states that (emphasis added) "the term 'employee benefit plan' shall not include any plan, fund or program, *other than an apprenticeship or other training program*, under which no employees are participants covered under the plan. . . ." In fact, 29 C.F.R. § 2520.104-22, which exempts apprenticeship and training programs from various ERISA disclosure requirements, expressly refers to apprenticeship programs as employee welfare benefit plans. Considering the express wording of ERISA, the interpretation of the statute by the courts, and the regulations of the Secretary of Labor, it is clear that apprenticeship programs, regardless of approval, are employee welfare benefit plans covered by ERISA. The next step, therefore, is to determine whether the California Prevailing Wage Law at issue, Cal. Labor Code § 1777.5, relates to or has a connection with ERISA plans and is therefore subject to preemption.

C. The California Prevailing Wage Laws Specifically Relate To, And Purport To Regulate, And Does Regulate, ERISA Plans.

Clearly, if a state law relates to an employee welfare benefit plan, using the word "relate" according to its ordinary, dictionary meaning, then preemption naturally follows. *See Greater Washington, supra*, 506 U.S. at 129-130. A state law relates to an ERISA plan if it singles out an ERISA plan for preferential treatment over another ERISA plan. *See Mackey v. Lanier Collection Agency & Svc., Inc.*, 468 U.S. 825, 830 (1988) (state garnishment exemption statute which protected ERISA welfare benefit plans from garnishment while exposing non-

ERISA plans to garnishment *singled out* the plans for different treatment and was thus preempted).

California's prevailing wage scheme, which singles out state-approved apprenticeship programs for favorable treatment (the payment of lower apprentice wages on public works), clearly "relates to" apprenticeship or other training programs and is therefore subject to ERISA preemption. This is no mere incidental or accidental regulation; the statute purposefully attempts to control an employee benefit plan (*i.e.*, rewards the "good" plans and punishes the "bad" plans).

As correctly determined by the Ninth Circuit, this action is indistinguishable from *National Elevator, supra*, 957 F.2d 1555. There, the Tenth Circuit held that an Oklahoma prevailing wage ruling, which required that elevator construction "helpers," a classification created under a series of nationwide collective bargaining agreements (NEIEP), be enrolled in a certified BAT apprenticeship program in order to receive a lower apprenticeship wage on state public works projects, was preempted by ERISA. After reviewing federal court opinions dealing with apprenticeship regulation and ERISA, the court determined that the ruling, a state law under ERISA (29 U.S.C. § 1144(c)), was not one of general application and subject to ERISA preemption:

We accept, as a general proposition, the state's right to regulate wages. But a wage law that provides an option favoring certain ERISA plans and benefits (BAT approved plans) over other ERISA plans and benefits (NEIEP) is not a law of "general application" and may be used to effect change in the administration, structure, and benefits of an ERISA plan. If a state is permitted to use a prevailing wage scheme to single out and

favor certain ERISA plans over other ERISA plans, the potential for abuse is great — a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans. We believe that defendants' ruling would discourage non-BAT approved ERISA training programs and encourage changes to NEIEP, a national employee benefit program. 957 F.2d at 1561.

The Tenth Circuit further found that the Fitzgerald Act, 29 U.S.C. § 29, did not save the Oklahoma from ERISA preemption because the Fitzgerald Act "merely seeks to facilitate development of apprenticeship programs — it does not mandate apprenticeship programs or seek to discourage other training programs. [footnote]." *Id.* at 1561-1562; *See also, Hydrostorage, supra*, 891 F.2d 719, 730-731.

California prevailing wage laws, specifically Labor Code § 1777.5, have a similar intent and effect as the Oklahoma ruling. The laws providing for the apprentice wage exemption cannot be considered "general application" laws because they expressly favor certain ERISA plans (those approved by the CAC) over other ERISA plans (for example, BAT approved apprenticeship/trainee programs). The state laws as written and applied thus discourage any training or proposed apprenticeship program that does not conform to CAC's regulations. The unapproved apprenticeship program at issue in this action was identical to a previously approved program, except that it switched from one union sponsor to another, thereby "losing" its approval. It was approved months later with no changes.²¹

21. Delay of the state approval process for years is one of the common tactics used to discourage new programs. The apprenticeship program in *So. Cal. ABC, supra*, 4 Cal. 4th 422, took approximately five years before it was finally approved, while the Washington state program which was the subject

The assertion that Cal. Labor Code § 1777.5 applies only to contractors and not to apprenticeship programs is ludicrous, since the statute expressly states which apprentices are "eligible" on public works:

Only apprentices . . . who are in training under apprenticeship standards and written apprentices agreements under Chapter 4 (commencing with Section 3070) of Division 3 [from CAC approved programs], are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

Of course this is regulation. A program is approved by the CAC must alter the progressive wage scales found in the standards. When apprentices performing public works and are required to be paid the State prevailing journeyman rate, program content is being regulated by reward and punishment.

The coerced modification of programs, altering wage and benefits in the standards when their apprentices work on public projects, is in direct contradiction to the purposes of training. "In order for . . . an apprenticeship program to work, it is essential that the employer be able to pay lesser wages to apprentices while they are in training." *MacDonald*, 949 F.2d at 274. The prevailing wage laws thus dictate reporting requirements for BAT programs, showing that journeyman wages are being paid, but also directly regulate the amount of benefits to be paid under and ERISA plan. On public works, BAT programs must not pay its trainee according to the standards, but according to the state-

(Cont'd)

of the antitrust suit in *Forrest*, *supra*, was finally approved by order of the Ninth Circuit seven years late. See, e.g., *Inland Empire*, *supra*, 78 F.3d 593.

determined prevailing wage. Laws of this nature have been expressly found to be subject to ERISA preemption. See *General Electric Co. v. Department of Labor*, 891 F.2d 25, 29-30 (2nd Cir. 1989) (ERISA preempts state law which requires type and amount of employer contribution to ERISA plan and rules under which plan will operate).

Further, Cal. Labor Code § 1777.5 has been found to regulate and/or relate to ERISA plans because the statute allows the state to enforce the terms of an ERISA plan (the existing state-approved program). In *Hydrostorage*, *supra*, 891 F.2d 719, the court ruled that even though the California statute was in aid of the existing apprenticeship program, the statute was an enforcement scheme which was not permitted under ERISA. *Id.* at 728-730. According to the court:

The very purpose of requiring Hydrostorage to apply was so that Hydrostorage would become bound by the Standards, an ERISA plan Thus, the order undoubtedly, "relates to" an ERISA plan in the sense that the order has a "connection with or a reference to" the Standards.

Likewise, in *J.A. Jones*, *supra*, 846 F.2d 1213, the Ninth Circuit held that ERISA preempts a state statute requiring employers on state public works projects to make contributions to employee benefit plans at or above the "prevailing" wage rate, regardless of the level set by an employment contract or collective bargaining agreement. In *J.A. Jones*, the Local Union's Apprenticeship Fund brought an action, based on a Washington state statute, for the difference between the employer contributions to a national apprenticeship training fund at rates set by a collective bargaining agreement with a national union, and the minimum level established by state law.

The holding of preemption in *J.A. Jones* confirms that a state cannot discriminate against particular apprenticeship programs where one program is "state" approved and the other is not, nor can a state mandate payment levels to the training program as part of its prevailing wage law. Thus, the State of California cannot force non-CAC approved ERISA programs to use journeyman prevailing wage rates for apprentices and trainees while allowing state-approved programs to pay less than prevailing journeyman wage rates.

Unlike most other employee benefit program, the wages paid apprentices are part of the standards and constitute an essential term of the benefit. An apprenticeship or training program which meets the criteria of 29 C.F.R. Part 29 must provide a progressive, graduated wage rate commensurate with the skill level of the apprentice. Thus, to supersede with its prevailing wage laws the wage rates which is part of the benefit program contained within the standards, the State of California is regulating the training as well as the benefits of a program's participants. These laws undeniably relate to and regulate ERISA-protected plans and are subject to ERISA's broad preemption provision.

Assuming, *arguendo*, that the California Prevailing Wage Laws do not "relate to" ERISA plans, they certainly have a "connection with ERISA plans, such that preemption must apply. As stated in *Blue Cross*, "We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objective of the ERISA statute as a guide to the scope of the state law that Congress understood to survive." *Blue Cross*, 115 S. Ct. at 1677.

Under this review, it is clear that Congress intended ERISA to preempt state law regulating apprenticeship which are not authorized by the Fitzgerald Act. Following the decision in *Hydrostorage*, and subsequent appellate cases ruling that states

go beyond the criteria found in the Fitzgerald Act when approving apprenticeship programs (*see, e.g., MacDonald*, 949 F.2d 270), bills were introduced in Congress to amend ERISA such that state apprenticeship and prevailing wage laws would be specifically excluded from ERISA's preemptive reach.²² In fact, the adversity encountered by Amicus Walther Electric Company during the company's attempt to become approved by the CAC was read into the Congressional Record by Congressman Ballenger of North Carolina. *See* H.R. 1036, 103 Cong. 1st Sess., 139 Cong. Rec. 8965-8966. However, no legislation ever came out of Congress amending ERISA in the manner. Clearly, if it was the intent of Congress to exclude apprenticeship programs from ERISA's coverage, then Congress would have passed the amendment to specifically exclude state apprenticeship and prevailing wage laws from ERISA's reach. The actions of Congress in this regard clearly indicate that ERISA preemption extends to the state law at issue in this case.

II.

CALIFORNIA'S PREVAILING WAGE LAWS ARE NOT SAVED FROM ERISA PREEMPTION.

State laws which are subject to ERISA preemption can still be deemed valid by operation of ERISA's "savings clause," 29 U.S.C. § 1144(d), which provides that "nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." There is no federal law which allows California's scheme for enforcing its prevailing wage laws to be "saved" from ERISA preemption.

Regarding apprenticeship, the only federal act which arguably can protect prevailing wage laws is the Fitzgerald Act,

22. Attached hereto as Appendix D and E, respectively, are the texts of H.R. 1036 and S. 1580.

29 U.S.C. § 50. Congress enacted the Fitzgerald Act in 1937 in order to protect apprentices by establishing minimum labor standards, promoting apprenticeship as a system of training skilled workers and encouraging the federal government to cooperate with state agencies in formulating apprentice standards. The Fitzgerald Act regulations, found at 29 C.F.R. Part 29, provide for a dual system for federal and state approval of apprenticeship programs, and establish minimum criteria a proposed program must meet in order to be approved. *See* 29 C.F.R. § 29.5. The Regulations also provide the means for de-registering a program should it fail to maintain the minimum approval standards. 29 C.F.R. § 29.7, and for recognizing State Apprenticeship Councils (such as the CAC) as the Secretary of Labor's "agent" to determine whether an apprenticeship program conforms with federal standards. 29 C.F.R. § 29.12.

"[A]ny state regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by . . . ERISA." *MacDonald*, 949 F.2d at 274. There is no Fitzgerald Act regulation or corresponding federal law which allows for California to enforce its prevailing wage on behalf of those in non-approved training programs. As stated by the Ninth Circuit in *Hydrostorage*, the Fitzgerald Act only sets forth regulations governing the eligibility for federal registration; it is not an enforcement mechanism for federal law. 891 F.2d at 731. It must be noted that the Fitzgerald Act only delegates the power of registration to the applicable State Apprenticeship Council. In this respect, it is only the CAC which is delegated the authority by BAT to regulate apprenticeship training in the State of California, not the Department of Industrial Relations or Labor Commissioner which enforces prevailing wage laws. As noted, a progressive wage scale is an integral component of an apprenticeship program's standards. *See* 29 C.F.R. § 29.5(5), Title 8, Cal. Code of Regulations § 212(c)(7). The CAC and the State can only regulate wages by means of approving a

progressive wage scale in the program's standards during the registration process; there is absolutely no authority for the CAC to re-delegate authority to the Director of California's Department of Industrial Relations or the Division of Labor Standards Enforcement to either determine the apprentice wage or act as the enforcement arm of the CAC to enforce apprentice wages. Essentially, the Fitzgerald Act can operate and fulfill its purpose independently from the California prevailing wage laws. On this basis, the state laws cannot be saved from preemption. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 101 (1983).

Further, while the State of California may have a traditional state interest regarding wages paid to workers, there is no "traditional" state interest concerning the payment or availability of benefits. The use of benefits in determining the payment of prevailing wages has been a fairly recent occurrence. For instance, the Davis-Bacon Act, 40 U.S.C. § 276a, required only a straight wage rate until 1964, when fringe benefits, including medical or hospital care, workmen's compensation, unemployment benefits, pensions, vacation pay, and "other bona fide fringe benefits . . . not required by other Federal, State, or local law" were included in the determination of the prevailing wage. Act of July 2, 1964, Pub. L. No. 88-349, 78 Stat. 238 (1965). In California, fringe benefits were not included in the determination prevailing wage rate until 1959, with the enactment of Calif. Labor Code § 1773.1. However, the State has never mandated that employers, in general, provide benefits to their worker and has never taken an interest, traditional or otherwise, as to the amount or type of benefits provided.²³ By

23. While the recent decision by the Ninth Circuit in *WSB Electric, supra*, is consistent with the Third Circuit's opinion in *Keystone Chpt. of Associated Builders and Contractors v. Foley*, 37 F.3d 945 (3rd Cir. 1994), cert. denied, 115 S. Ct. 1393 (1995) and the Eighth Circuit's opinion in *Minnesota Chpt. of Associated Builders and Contractors v. Minnesota Dept.*

expressly including apprenticeship and training programs within ERISA's coverage in 1974, Congress has formally recognized the providing of training benefits as a matter of exclusive federal concern to the exclusion of state regulation. The California Prevailing Wage Laws at issue in this case impermissibly intrude on the federal law.

CONCLUSION

For the reasons stated above and in the Respondent's Brief, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MARK R. THIERMAN
Counsel of Record
 GEORGE P. PARISOTTO
 THIERMAN LAW FIRM
Attorneys for Amici Curiae
 120 Green Street
 San Francisco, California 94111
 (415) 391-9200

(Cont'd)

of Labor and Industry, 47 F.3d 975 (8th Cir. 1995), it is inconsistent with the Ninth Circuit decision in this case, and incorrectly decided, since there is no traditional state interest in regulating benefits. Prevailing wages should not contain minimum or maximum benefit requirements and should adopt either a "total package" concept as does the federal prevailing wage law or a "base wage only" rate policy as does state minimum wage laws of general applicability. *See General Electric, supra*, 891 F.2d 25.

APPENDIX A — LETTER DATED APRIL 7, 1993

THIERMAN LAW PARTNERSHIP
 Attorneys at Law
 601 California Street, 17th Floor
 San Francisco, CA 94108
 (415) 391-9200
 Fax (415) 434-2867

Mark R. Thierman
 Wendy A. Cheit

Robert Fried
 Carole E. Seliger
 John F. Penrose
 George P. Parisotto
 Janis S. Bumgarner
 Robert A. Conte

April 7, 1993

Chairman and Members of the
 United States House of Representative
 Committee on Labor-Management Relations
 United States House of Representative
 Capitol Building
 Washington, D.C.

Dear Mr. Chairman and Honorable Committee Members

On behalf of myself and the National Association of Manufacturers (NAM), I would like to thank you for allowing me to address the subcommittee during its March 24, 1993 hearing on HR 1036. As I stated, I represent many organizations with vested interest in the future of apprenticeship training. These include the Southern California Chapter of Associated Builders and Contractors Joint Electrical Apprenticeship Committee, which I represented in the enclosed case, as well as several AFL-

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CIO Joint Apprenticeship Committees. The purpose of this letter is to provide for the hearing record, a supplement to my testimony and copies of the legal authorities mentioned at the hearing.

First, let me repeat that NAM seeks to maintain ERISA's expansive preemption provision, 29 U.S.C. § 1144(a), because its member must function under uniform rules throughout the United States for all types of employee benefits. If there are problems with specific rules, or in varied instances, the lack of rules, we suggest the matter be addressed and resolved by the appropriate federal agency, regarding apprenticeship, this is the United States Department of Labor, Bureau of Apprenticeship and Training. We do not believe the matter should be delegated to State and Local authorities who impose inconsistent rules, or give "favored, local employers" special status based on political or inappropriate influences. Like the other witnesses who appeared before you, NAM endorses the concept of a level playing field so that business is not encouraged to leave existing facilities simply to find a more favorable regulatory environment.

Second, NAM seeks to expand and strengthen apprenticeship training by developing national standards for excellence in apprenticeship. NAM agrees with the position of the United States Court of Appeals for the Ninth Circuit in *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 120 L. Ed. 869 (1992), which clarifies and severely limits the prior decision of the same court in the case of *Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 112 L. Ed.2d 46 (1990). I have enclosed a copy of the MacDonald case which has been followed by the United States Court of Appeals

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for the Second Circuit in *Apprenticeship and Training Council of Teamsters Local 363 v. New York State Department of Labor*, 984 F.2d 589 (2d Cir. Jan. 27, 1993) (copy also enclosed) which clearly allows States to regulate apprenticeship consistent with federal law pursuant to the National Apprenticeship Act, 29 U.S.C. § 50, commonly known as the Fitzgerald Act, and its implementing regulations found at 29 C.F.R. Part 29.

While NAM agrees with many of the goals behind this legislation, NAM also believes that HR 1036 as drafted actually works against training, against minority participation in apprenticeship, and against the interest of construction contractors who maintain employee benefit plans. I am enclosing for your review the findings and recommendations of California's Little Hoover commission in their January 22, 1992 report, addressed to California's Director of the Department of Industrial Relations, on minority access to existing apprenticeship programs. In addition to the conclusion of the report, which states that efforts to increase apprenticeship participation among minorities and females in the construction industry are hampered by the lack of new programs. I want to point out that the Chairman of the Commission was Nathan Shappel, a union signatory contractor from Southern California.

NAM believes the framework for creating a national standard for excellence in apprenticeship has been provided both in the MacDonald decision, and in the most recent decision of the California Supreme Court in *Southern California Chapter of Associated Builders and Contractors v. California Apprenticeship Council*, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (Dec. 24, 1992) (copy enclosed). In both these cases, the Courts held that the federal government, through the Secretary of Labor, establishes the standards for apprenticeship program approval

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and delegates to the States, through State apprenticeship councils, the authority to implement and administer the federal guidelines. Relying on the Fitzgerald Act's mandate of federal/state cooperation in apprenticeship, the Court in *So. Cal. ABC* ruled that ERISA does not preempt state regulation of apprenticeship program approval provided that the regulations are necessary to enforce the Fitzgerald Act and are consistent with federal purposes. State laws which are separate and independent from the Fitzgerald Act, imposing inconsistent approval criteria, are preempted. NAM believes this position is the correct state of the law on ERISA preemption. Currently, California is amending its prevailing wage and apprenticeship laws to reflect the *So. Cal. ABC* ruling (copy of draft interpretive bulletin enclosed). Should Congress feel the need to clarify its position in this regard, the California Supreme Court's view should be codified by Congress as a workable solution consistent with ERISA preemption and the Fitzgerald Act's requirement of a national apprenticeship system administered through state agencies.

In its present form, the proposed HR 1036 not only removes the Fitzgerald Act exemption to ERISA, but it also fails to address the real issue presented in *Hydrostorage*, which was a funding issue more than a program issue. In *Hydrostorage*, the contractor was being forced by State law to join and contribute to the state-approved union apprenticeship program, rather than encouraged by ERISA tax incentives to either join or establish its own state-approved program. If HR 1036 is passed without change, contractors may potentially be required to join and fund as many ERISA plans, with varying terms and conditions, as the number of states in which they work. This result does not serve the main purpose behind the enactment of ERISA uniformity of the employee benefits law.

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In its present form, HR 1036 also punishes construction contractors, mostly union contractors, who provide cost-efficient benefits to their employees through uniform, nationwide employee benefits plans. Rather than attempt to repeal the Second Circuit's decision in *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), which held that New York could not require a contractor to make up the difference between the cost of each of its ERISA plans and the cost of each of the "prevailing" benefit plans, NAM believes that employees would be better served if HR 1036 compared the contractor's total package — i.e., wages and benefits — with the total "prevailing" package.

Additionally, benefits should be compared either on an "actual benefit" basis or a "cost" basis. ERISA was enacted to promote the establishment of cost-efficient, nationwide benefit plans unencumbered by varying state or local requirements. HR 1036 undermines this laudable ERISA goal by ignoring the actual value to the employee of the benefit package and focusing solely on its cost. This has the perverse effect of rewarding contractors who have high costs (but low actual benefits) and punishing contractors who provide a high level of benefits on a cost-efficient basis. At a time when our nation is attempting to control the aggregate level of health care costs and provide adequate health care at a reasonable cost, Congress should not be creating disincentives for employers to attain precisely this result.

On the matter of mechanics liens, we oppose any one who does not pay the contractually agreed upon costs of providing benefits. We believe that appropriate remedies should be available. Because employee benefit plans exist and continue due to federal law, we believe that any necessary additional

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remedies for the collection of contributions to multi-employer benefits plans should be consistent and a part of the federal ERISA. Further, in order to encourage our members to employ contractors who provide benefits, the amount of any third party liens should be strictly limited to the express contractual payment due the contractor from the owner.

If the Committee or any member thereof, would like further discussion or exact language to implement these suggestions. I would be most happy to respond. Thank you for your kind attention and courtesy at the hearing.

Very truly yours,

s/ MARK R. THIERMAN
Mark R. Thierman

Enclosures:

January 22, 1992 Little Hoover Commission Report of Denial of Minority Participation in California's Union Apprenticeship Programs.

United States Court of Appeals Decision in *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 120 L. Ed.2d 869 (1992).

California Supreme Court Decision in *Southern California Chapter of Associated Builders and Contractors v. California Apprenticeship Council* 4 Cal. 4th 422 (1992)

California's New Regulations Adopting State Prevailing Wage Law to Federal Standards

**APPENDIX B — MEMORANDUM
DATED OCTOBER 12, 1995**

**State of California
Department of Industrial Relations
Memorandum**

**455 Golden Gate Avenue, Suite 3220
San Francisco, CA 94102
(415) 703-3850
FAX No. (415) 703-5460**

Date: October 12, 1995

To: Rulon Cottrell, Chief — DAS
Victoria Bradshaw, Labor Commissioner

From: s/ John M. Rea
John M. Rea, Chief Counsel
Fred D. Lonsdale, Sr. Counsel
Administration, OD-Legal
Department of Industrial Relations

Subject: Legal Guidance Concerning The Effect of
Dillingham

The Director has asked that we, in consultation with DLSE's Chief Counsel, Tom Cadell, respond to your requests for legal guidance concerning the effect of *Dillingham Const. v. County of Sonoma* (9th Cir. 1995) 57 F.3d 712, on the work of the Division of Apprenticeship Standards and the Division of Labor Standards Enforcement. This memo will set forth the limits it places on Department policy and is intended to facilitate development of specific practical enforcement policies by each Division.

Appendix B

I. Introduction.

In *Dillingham*, the Court preempted the application of the prevailing wage law which denied the lower apprentice rate on public works to employees of a contractor who was participating in a collectively bargained joint apprenticeship program which had not yet been given final state approval. Unless reversed by the United States Supreme Court, this decision changes the legal effect of Labor Code section 1777.5.

Dillingham found that Labor Code section 1777.5's restriction of the exception to the prevailing wage law, allowing contractors to pay the lower apprentice per diem wage only to apprentices in state approved programs, discouraged participation by contractors in unapproved apprenticeship plans (some of which were covered by ERISA), and encouraged participation in state approved apprenticeship plans. Thus, the Court held, this restriction in the prevailing wage law "relates to" ERISA apprenticeship plans and was preempted.

In response to a California Supreme Court decision,¹ DAS and DLSE had taken the position in your July 1993 Enforcement Bulletins that, so long as the program approval rested on factors required by the cooperative relationship to enforce and promote federal standards of the National Apprenticeship (Fitzgerald) Act and Department of Labor rules under that Act, there was no preemption of the provisions of Labor Code section 1777.5.

1. *So Cal. ABC v. CAC* (1992) 4 Cal. 4th 422, 14 Cal.Rptr.2d 491.

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Some segments of your regulated public have counseled ignoring *Dillingham* to the extent it is inconsistent with *So Cal. ABC* because they believe that preemption of section 1777.5 would "impair" the approval function because it would compel the state to treat an unapproved program as though it had met the criteria for approval, thus making the standards for approval meaningless. In addition, by removing an incentive for programs to comply with the Fitzgerald Act requirements, nearly half a century of the Congressional direction to encourage the inclusion of such standards in contracts of apprenticeship would be undercut. Finally, by giving potential advantage to those contractors who are not engaged in serious training, *Dillingham* would hinder bona fide apprenticeship programs which depend on public works to provide thousands of on-the-job training hours needed to produce a trained journey level employee.

However correct these arguments are, our legal advice is that DIR is obliged to follow the rule of the Ninth Circuit, which covers California (although there is a conflict with other federal circuits on this point²). Thus, as we discuss more fully below, *Dillingham* has determined that section 1777.5's lower apprentice rate can be paid by contractors to all apprentices in programs sponsored by plans covered by ERISA, even where there has been no program approval.

Because *Dillingham* applies ERISA preemption only to

2. DIR has been given permission by the Governor's Office to petition the Supreme Court to review *Dillingham*.

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state laws requiring prevailing wages, a contractor's opportunity to pay lower rates may vanish if the source of funding for the public works job is not purely state, but partly federal. California approval of apprenticeship programs still functions as the approval for federal purposes, and the federal prevailing wage law, "Davis-Bacon," permits the contractor to pay lower wages only to apprentices in *approved* programs.

- II. *All Construction Workers Who Are (1) Apprentices, And (2) Participants In An Approved Or ERISA Covered Apprenticeship Program Can Be Paid The Apprentice Rate On State Public Works. Their Program Need Not Be "Approved" Or "Registered" With Either The State (DAS) Or Federal (BAT) Governments, Unless The Job Is Also Subject To Federal Prevailing Wage Laws.*

A contractor judging what to pay apprentices on a public works job, or a program coordinator assessing whether the correct wage rates have been paid, now faces the complexity of three possible variations on what used to be a simple legal requirement to pay a single apprentice rate, determined from a single source, in all circumstances:

- a) On a job funded solely with federal money, which is subject to Davis-Bacon prevailing wage requirements, only California (or where applicable, BAT-registered apprentices³) may be

3. BAT has restricted direct BAT approval of apprentices programs in
(Cont'd)

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paid less than the journey level rate. That rate would be based on the percentage progression found in the apprentices' program's standards. As is now the case, only the federal Department of Labor, or its agents, would enforce that requirement.

- b) On a job funded solely with state money which is subject to Labor Code section 1777.5 requirements, any apprentices participating in an apprenticeship program, which is either an approved program or one covered by ERISA, may be paid less than the journey level rate. For the contractor paying the lower rate, the method of showing that such workers are apprentices is no longer restricted to showing that the program which they are in is one registered with California. Likewise, the plan in which they participate does not need to be approved by California or the federal BAT. It must, if not approved, be covered by ERISA.
- c) On a job funded with both state money and federal money — that is both within state Labor Code section 1777.5's requirements *and* federal Davis-Bacon prevailing wage requirements — the

(Cont'd)

California to a small number of programs on Indian and military reservations. Apprentices indentured to an employer in a BAT state outside California may be employed by that employer on a California project, subject to any limitations in the BAT approved standards. Except for these very unusual situations, all other apprentices would be in California approved programs.

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situation is generally the same as on projects funded with only federal money: Only apprentices in approved programs may be paid less than the journey level rate specified in the Davis-Bacon wage determination. That federal rate would be based on the percentage progression found in the apprentices' standards. Enforcement of such a rate would be by the federal Department of Labor or its agents and not by California.⁴ What changes because of *Dillingham* is that California would enforce the state journey level rate only where the person paid the apprentice rate is not an apprentice or is an apprentice but not participating in a plan covered by ERISA.⁵

III. Other Results Of *Dillingham* On Other Apprenticeship Laws.

1. The Program Approval Function.

A portion of the regulated public has offered, and we reject, the reading of *Dillingham* which would find ERISA preemption of any mention of apprenticeship in state law on the theory that any mention of apprenticeship "relates to" an ERISA plan in some way. Such a broad reading would

4. Except where the state per diem apprentice rate is higher than the federal Davis-Bacon rate, in which case the DIR would enforce this higher rate.

5. *Dillingham* relies on the ERISA preemption clause, and that only protects ERISA-covered plans from state laws.

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preempt both section 1777.5's recognition of an exception to the per diem prevailing wage for apprentices on public works, and the authority to approve apprenticeship or other programs in sections 3070 et seq. Both readings have been offered, based largely on *Dillingham*'s seemingly expansive reading of "relate to" and its citation of a case⁶ invalidating a Georgia statute which singled out ERISA covered plans for favorable treatment.

We reject the premise that *Dillingham* invalidates any state law exception to the prevailing wage law which would allow contractors to pay apprentices less than the prevailing wage. We reached this conclusion because *MacDonald*,⁷ another earlier case by the Ninth Circuit, pointed out that in the building trades:

In order for such an apprenticeship program to work, it is essential that the employer be able to pay lesser wages to apprentices while they are in training. Prevailing wage statutes for public works thus present a significant obstacle, unless apprenticeship programs are exempted. *Id.* at 274.

A state prevailing wage law that *allows no apprentice exception* could be attacked as "a

6. *Mackey v. Lanier Collection Agency* (1988) 486 U.S. 825.

7. *Electrical Joint Apprenticeship Comm. v. MacDonald* (9th Cir. 1991) 949 F.2d 270.

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significant obstacle" to ERISA plans which offer apprentices to contractors for the reasons given in *MacDonald*. A prevailing wage law that *grants* an *apprentice* exception could be challenged as "relating to" ERISA plans. Given a situation in which ERISA preemption could be argued in either case, the clearest guidance from the Court seems to be the statement in *MacDonald* that an exemption is essential for apprenticeship to work. This reading is reinforced by the fact that *Dillingham* did not hold that all of section 1777.5 was preempted only the restriction of the exception to contractors employing apprentices in approved plans and denial of the lower wages to contractors employing apprentices in unapproved plans.

Invalidation of any state law which mentions apprentices and apprenticeship program approval was not the subject of *Dillingham*. *MacDonald*, however, clearly held that the state's approval function was not preempted so long as the criteria for approval did not change the requirements of the Fitzgerald Act or its regulations. Although it is difficult to square the reasoning of *Dillingham* with the reasoning of *MacDonald*, *Dillingham* did not purport to overrule *MacDonald*'s holding that there are parallel tracks for federal and state approval of apprenticeship programs. *Dillingham* simply found that the *MacDonald* holding (that the state approval process was not preempted by ERISA) did not decide the issue before it, which it characterized as a state's application of the prevailing wage law, not a state's use of its

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apprenticeship program approval authority. Since state approval or disapproval of apprenticeship programs is relied upon by the federal Department of Labor's BAT and Wage Hour Division in enforcing federal wage requirements on Davis-Bacon public works, and *Dillingham* did not present the Davis-Bacon issue, the reading the Department adopts is that its authority to continue with approval functions is not preempted.

The law concerning apprenticeship must take into account many, sometimes conflicting, policies. The balance must eventually resolve conflicts in Federal policy and Congressional intent found in ERISA preemption, the ERISA clause saving certain laws from preemption, and the Fitzgerald Act, as well as policies from state apprenticeship law and state prevailing wage law. The difficulty of considering only ERISA preemption and pushing ERISA preemption to literal extremes has been noted by the United States Supreme Court in *New York State Conference of Blue Cross and Blue Shield v. Travelers* (1995) __ U.S. __, 115 S.Ct. 1671, where Justice Souter points out that, since all things are "related" in some way, an unreasonably broad and unthinking reading of ERISA preemption would eventually encompass all laws. We take the cautious approach taken by pre-*Dillingham* Ninth Circuit cases to be a partial recognition of this problem.

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2. *The General Prevailing Wage Law Still Supplies The Wage Rates To Be Paid All Apprentices.*

Historically, the prevailing wage rates for apprentices were derived from "standards" which in turn always stated wages correlated to a period of progress in training. This "progressive schedule of wages" was required in the programs' standards by California as a condition of approval, for it is required by federal regulations under the Fitzgerald Act.

Thus, for apprentice plans which operate outside California approval, there may be no progressive schedule. The potential problem of public works jobs lacking applicable apprentice rates can be resolved by making trade-specific rates available to all employers who use apprentices from apprenticeship programs, including those not approved California but covered by ERISA. This approach will be most consistent with both Congressional and California legislative intent. The apprentice per diem wage rate can be determined by the Director through the Division of Labor Statistics and Research as a part of the process of setting the prevailing wage using the standard methodology set out in Title 8, California Code of Regulations, section 16200 et seq. for determination of the prevailing wage.

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3. *Dillingham And Labor Code Section 1777.5's Ratio, Notice And Contribution Requirements.*

After *Dillingham*, we feel it appropriate to revisit the other mandates of section 1777.5. DIR last revised these mandates in light of a California Supreme Court case, *So Cal. ABC*,⁸ in your two 1993 enforcement memos.

As you observed in 1993, the contribution requirement is not an obligation imposed on any ERISA plan. The state makes training funds available by offering, in section 1777.5, to pay for them as part of the bid costs on public works, and if they are not used for apprenticeship training in the crafts or classifications used on the job in the area of the public work, then they are to be returned to the state's general fund by deposit with the CAC. *Dillingham's* principles suggest that DIR may have been improperly restricting the apprenticeship plans to which such funds could be paid. As an enforcement policy DIR should not pursue charges that an employer paid section 1777.5 apprenticeship funds to an *unapproved* apprenticeship program (which meets the statutory criteria for receipt) rather than returning them to the state via the CAC. Henceforth, any contributions to an apprenticeship plan which trains on California public works in an appropriate trade or craft, whether such plan is approved or not, meets section 1777.5's requirement.

8. *So Cal. ABC, supra.*

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The obligation to notify a local apprenticeship plan is likewise an obligation on a contractor, not on an ERISA plan. The contractor is not required to participate in any ERISA plan, and the plan is not required to take any action whatsoever. In keeping with the rationale discussed above, notice to any apprenticeship program, approved or otherwise, is all that should be required. This obligation will allow the apprenticeship community to continue to be apprised of ongoing public works and thus allow the apprentice program to offer their services to the contractor.

The final section 1777.5 obligation concerns the mandatory use of apprentices on public works projects, often called the ratio requirement. The mandatory use of apprentices is not to be confused with the other "ratio" often found in apprentice standards — the ratio of journey level workers to apprentices required for on the job training under the standards.⁹ As to the minimum use ratio, following a narrow reading of *Dillingham*, DIR should continue to require employers to use apprentices on state public works projects. As the Court noted in *MacDonald*, apprentice training on public works is an essential component of apprenticeship. The state has an interest in having and building a trained work force. This interest resulted in the legislative mandate that apprentices

9. This "ratio" often sets a maximum number of apprentices per journey level worker. As to this "ratio" requirement, the state will continue, as it always has, to defer to the program standards.

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be given on the job training on public works. This use of public funds for vocational education is a traditional state function.

We read *Dillingham* to say only that we may not pick and choose between ERISA covered apprentice programs to favor state approved programs, and thus when section 1777.5 and state contract provisions require the use of apprentices, that requirement can be met equally by apprentices from non-approved programs.

Conclusion

The Division of Labor Standards Enforcement and the Division of Apprenticeship Standards remain committed to fostering, promoting, and developing the interests of apprentices and of industry in the state. Formulating the specific program guidance to effectuate this within the limits of *Dillingham* will be challenging. The foregoing is as certain as we can be in assisting you in that effort, and in appraising the legal merit of suggestions which you have received from the regulated community.

JMR:FDL:clu
(cluhd-dir/das "Dill man memo/counsel-3")

APPENDIX C — LETTER DATED JULY 2, 1996

STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF APPRENTICESHIP STANDARDS
2424 ARDEN WAY, SUITE 160PH: (916) 263-2877
FAX: (916) 263-0981

July 2, 1996

Mr. Robert H. Nambo, Executive Director
ACTA UAC
900 Fulton Avenue, Suite 240
Sacramento CA 95825

Dear Mr. Nambo:

The draft revision of standards and selection procedures submitted by ACTA have been reviewed and returned, not approved. The issues of concern to the DAS Program Planning & Review Unit follow.

Standards

1. *46 northern counties*: Santa Clara should be added and Santa Barbara should be deleted unless there are more than 46 counties and not all are in what is commonly referred to as Northern California,
2. An appendix or otherwise must be provided which outlines the obligations, rights, and general operating procedures. Sub-committee and main committee interface should be

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addressed. Time frames are critical and need to be identified and in compliance with the California Code of Regulations (CCR), Sections 201 and 202.

3. *Related Instruction*: The original letter from was not a firm commitment. Affirm commitment letter is needed together with a year by year course outline of the related instruction, and describe how the related instruction will be addressed. How do UAC and Modesto Junior College propose to provide related instruction throughout Northern California? A clear description is needed, Please be sure to address all requirements of Section 3024 of the California Labor Code.
4. *Section 212, CCR*
Not all required items are addressed in the standards. All required items must be addressed.
5. *Wage Rates*:
Apprentice wage rates do not conform to CCR Section 208, Attached is a table for ready reference. The overtime provision is not acceptable. Is there a written understanding with all employees and employers? Public works wages: refer to Section 208(b).
6. *Article XV - Ratio*: CCR Title 8, Part I, Chapter 2, Sections 205(a), (1), (2).

Selection Procedures

1. Para 5(a): What type of proof - identify document(s).
2. Para 5(c): Medical exam Para required? By employers?

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3. Para 5(d): LEAs in training area - are there other LEAs? Location of testing must be identified. What factors are considered in oral interview? Weight of factors? Passing scores?
4. Para 5(e): Ranking on other regional list - specify. How are tie scores broken?
5. Para 5(g): How will list of qualifieds be utilized to enhance compliance with affirmative action obligations (goals)? How many women are currently registered?
6. Para 6: Goals should be based on area of coverage, i.e., labor market area.
7. The reviewing unit has determined that your affirmative action plan is passive.
 - a. Target protected group where deficiencies exist.
 - b. Provide time frames to correct deficiencies.
 - c. Specify how you intend to place women in your program.

Since you are requesting expansion of your area of coverage (labor market area) and in an area where similar programs exist, the requirements of CCR Sections 212.2 and 215 will apply. As you remember, the 212.2 process can consume a long period of time. Therefore, DAS recommends that additional requirements set forth in Section 212 and the additional requirements set forth in Section 208 be accomplished by a revision to approved standards, i.e., DAS-24.

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Attached is a copy of suggested language for your standards text. The approval terminology for the DAS Chief should be as follows:

the foregoing apprenticeship standards, being in conformity with the rules and regulations of the California Apprenticeship Council, the California Code of Regulations, and applicable federal regulations, are hereby approved _____ and become effective the day they become the order of the council,

The reviewer suggested that the selection procedures be separated from the actual standards in the form of an addendum to standards.

We have been advised that we may no longer accept for approval or registration employers outside your current approved area of coverage/labor market area or apprentice agreements for employers who are outside this area. Please call if you have any questions.

Sincerely,

s/ Albert M. Rojas
Albert M. Rojas
Apprenticeship Consultant

cc: Rod DeHart, President

APPENDIX D — HOUSE REPORT NO. 1036

103RD CONGRESS; 2ND SESSION
IN THE HOUSE OF REPRESENTATIVES
AS REPORTED IN THE HOUSE

H.R. 1036

1993 H.R. 1036; 103 H.R. 1036

SYNOPSIS:

ABILL To amend the Employee Retirement Income Security Act of 1974 to provide that such Act does not preempt certain State laws.

DATE OF INTRODUCTION: FEBRUARY 23, 1993

DATE OF VERSION: AUGUST 8, 1994 — VERSION: 6

SPONSOR(S):

Mr. BERMAN (for himself, Mr. FORD of Michigan, Mr. WILLIAMS, Mr. GUNDERSON, Mr. MILLER of California, and Mr. SHAYS) introduced the following bill; which was referred to the Committee on Education and Labor

JUNE 14, 1993

Additional sponsors: Mr. KILDEE, Mr. ENGEL, Mr. ANDREWS of New Jersey, Mrs. MINK, Mr. STRICKLAND, Ms. PELOSI, Mr. STARK, Mr. DIXON, Mr. WAXMAN, Mr. DELLUMS, Mr. ROEMER, Mr. REED, Mr. BECERRA, Mr. COSTELLO, Mr. PENNY, Mr. MANTON, Mr. KENNEDY, Mr. TUCKER, Mr. FILNER, Mr. OLVER, Mr. SANDERS, Mr. PETERSON of Minnesota, Mr. STOKES, Mr. YATES, Mr. HOLDEN, Mr. MAZZOLI, Mr. FAZIO, Ms. ROYBAL-ALLARD, Mr. VISCLOSKY, Mr. MCCLOSKEY, Mr. DURBIN, Mr. LANTOS, Mr. ROMERO-BARCELO 1, Mr.

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ACKERMAN, Mr. BROWN of California, Mr. EDWARDS of California, Mr. MINETA, Mr. STUPAK, Mr. SKAGGS, Mr. MCDERMOTT, Mr. RAHALL, Mr. PALLONE, Mr. HAMBURG, Mr. DEUTSCH, Mr. KOPETSKI, Ms. ESHOO, Mrs. COLLINS of Illinois, Mr. JOHNSTON of Florida, Mr. BEILENSON, Mrs. CLAYTON, Mr. SABO, Mr. MOAKLEY, Ms. WOOLSEY, Mrs. UNSOELD, Mr. LAFALCE, Mr. MINGE, Mr. KLECZKA, Mr. KANJORSKI, Mr. SHARP, Mr. FINGERHUT, Mr. RIDGE, Mr. HINCHEY, Ms. LONG, Mr. BARLOW, Mr. LIPINSKI, Mr. MURPHY, Mr. KREIDLER, Mr. FOGLIETTA, Ms. HARMAN, Mr. LAROCCO, Mr. KING, Mr. EVANS, Ms. DELAURO, Mr. FRANK of Massachusetts, Ms. VELA IZQUEZ, Mr. NADLER, Mr. TORRES, Mr. REYNOLDS, Mrs. SCHROEDER, Mr. HOCHBRUECKNER, Mr. OBERSTAR, Mr. WHEAT, Mr. HUGHES, Mr. YOUNG of Alaska, Mr. VENTO, Mr. MEEHAN, and Mr. KLINK

SEPTEMBER 22, 1993

Additional sponsors: Mr. HASTINGS, Mrs. KENNELLY, Mr. WYNN, Miss COLLINS of Michigan, Mr. ABERCROMBIE, Mr. DEFAZIO, Mr. MENENDEZ, Mr. GENE GREEN of Texas, Mr. BROWN of Ohio, Mr. BORSKI, Mr. COYNE, Mr. THOMPSON of Mississippi, Mr. MARKEY, Mr. NEAL of Massachusetts, Mr. CARDIN, Mr. PASTOR, Mr. STUDDS, Ms. SLAUGHTER, Mr. PAYNE of New Jersey, Mr. BONIOR, Mr. SWIFT, Ms. KAPTUR, Mr. LEWIS of Georgia, Mr. BARRETT of Wisconsin, Mr. DICKS, Mr. BACCHUS of Florida, Mr. MARTINEZ, Ms. CANT WELL, Mr. SWETT, Mrs. MALONEY, Mr. SERRANO, Mr. MOLLOHAN, Mr. ANDREWS of Maine, and Mr. POMEROY

TEXT:**ABILL**

To amend the Employee Retirement Income Security Act of 1974 to provide

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H. R. 1036 AUGUST 8, 1994

PAGE 3

— VERSION: 6

that such Act does not preempt certain State laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ERISA PREEMPTION RULES NOT TO APPLY TO CERTAIN ADDITIONAL STATE LAWS.

Section 514(b) of the Employee Retirement Income Security Act of 1974

(29 U.S.C. 1144(b)) is amended by adding at the end the following new paragraph:

“(9) Subsection (a) shall not apply to —

“(A) any provision of State law to the extent that such provision requires the payment of prevailing wages, including employee benefits, on public projects and permits any prevailing employee benefit plan contribution or cost requirement of such law to be met by crediting

“(i) the payment of employee benefit plan contributions or costs,

“(ii) the payment of wages in lieu of such contributions or costs, or

“(iii) the payment of a combination of wages and such contributions or costs; except that this subparagraph shall not be construed to exempt from subsection (a) any such provision to the extent it otherwise mandates the maintenance of, or otherwise regulates the benefits or

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operations of, any employee benefit plan;

“(B) any provision of State law to the extent that such provision —

“(i) establishes minimum standards for the certification or registration of apprenticeship or other training programs,

“(ii) concerns the establishment, maintenance, or operation of a certified or registered apprenticeship or other training program, or

“(iii) makes certified or registered apprenticeship or other training an occupational qualification, and does not conflict with any right, requirement, or duty established under this title; or

“(C) any provision of State law to the extent that such provision provides for a mechanics’ lien or other lien, bonding, or other security for the collection of delinquent contributions to a multiemployer plan.”.

SEC. 2. EFFECTIVE DATE.

The amendment made by section 1 shall take effect on the date of the enactment of this Act and shall apply to matters with respect to which actions are pending on or after such date.

APPENDIX E — SENATE BILL NO. 1580

FULL TEXT OF BILLS

103RD CONGRESS; 1ST SESSION
IN THE SENATE OF THE UNITED STATES
AS INTRODUCED IN THE SENATE

S. 1580

1993 S. 1580; 103 S. 1580

SYNOPSIS:

A BILL To provide that the Employee Retirement Income Security Act of 1974 does not preempt certain State laws, and for other purposes.

DATE OF INTRODUCTION: OCTOBER 21, 1993

DATE OF VERSION: OCTOBER 22, 1993 — VERSION: 1

SPONSOR(S):

Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

TEXT:

* Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, *

SECTION 1. ERISA PREEMPTION RULES NOT TO APPLY TO CERTAIN ADDITIONAL STATE LAWS.

Section 514(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144(b)) is amended by adding at the end the following new paragraph:

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“(9) Subsection (a) shall not apply to —

“(A) any provision of State law to the extent that such provision requires the payment of prevailing wages, including employee benefits, on public projects and permits any prevailing employee benefit plan contribution or cost requirement of such law to be met by crediting —

“(i) the payment of employee benefit plan contributions or costs,

“(ii) the payment of wages in lieu of such contributions or costs, or

“(iii) the payment of a combination of wages and such contributions or costs; except that this subparagraph shall not be construed to exempt from subsection (a) any such provision to the extent it otherwise mandates the maintenance of, or otherwise regulates the benefits or operations of, any employee benefit plan;

“(B) any provision of State law to the extent that such provision —

“(i) establishes minimum standards for the certification or registration of apprenticeship or other training programs,

“(ii) concerns the establishment, maintenance, or operation of a certified or registered apprenticeship or other training program, or

“(iii) makes certified or registered apprenticeship or other training an

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occupational qualification, and does not conflict with any right, requirement, or duty established under this title; or

“(C) any provision of State law to the extent that such provision provides for a mechanics’ lien or other lien, bonding, or other security for the collection of delinquent contributions to a multiemployer plan.”.

SEC. 2. EFFECTIVE DATE.

The amendment made by section 1 shall take effect on the date of the enactment of this Act and shall apply to matters with respect to which actions are pending on or after such date.